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APPENDIX

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
15

CLARENCE DEBACKER,
Appellant,

—v.—

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,
Appellee.

APPEAL TO THE SUPREME COURT OF NEBRASKA

FILED OCTOBER 17, 1968
PROBABLE JURISDICTION NOTED FEBRUARY 24, 1969

Supreme Court of the United States

OCTOBER TERM, 1968

No. 662

CLARENCE DEBACKER,

Appellant,

—v.—

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL TO THE SUPREME COURT OF NEBRASKA

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IN THE COUNTY COURT
OF DODGE COUNTY, NEBRASKA

BEFORE RICHARD C. MOREHOUSE,
JUDGE OF THE JUVENILE COURT OF SAID COUNTY

IN THE INTEREST OF CLARENCE J. DEBACKER,
A Child Under Eighteen Years of Age

PETITION—Filed February 15, 1968

Comes now Richard L. Kuhlman, the duly elected, qualified and acting County Attorney in and for Dodge County, Nebraska, and respectfully represents and shows to the court that matters have come to my knowledge which indicate that Clarence J. DeBacker is a delinquent child within the meaning of Section 43-201(4) of the Revised Statutes of Nebraska for 1943, as amended.

That said child is a delinquent child in that he is seventeen years of age, having been born on February 5th, 1951, and that he did on or about the 26th day of January, 1968, in Dodge County, Nebraska, then and there being, did then and there unlawfully, feloniously and knowingly have in his possession and custody a certain false, forged and counterfeited bank check for the payment of money, which is in the words and figures following, to wit:

"FIRST NATIONAL BANK 76-7
Of Fremont 1041

FREMONT, NEBR. Jan. 26, 1968 No. .....

PAY TO THE
ORDER OF O. P. Skaggs $30.00

thirty dollars 00/100 - - - - - - - - - - - - - DOLLARS

FOR food

Donald J. DeBacker
160 Jefferson Rd."

with the intent then and there to utter and publish said false, forged and counterfeited bank check as true and genuine, knowing the same to be a false, forged and

counterfeited bank check, and with the intent then and there and thereby to prejudice, damage and defraud person or persons, body politic or corporate, the said Clarence J. DeBacker, well knowing the same to be falsely made, forged and counterfeited, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

That Donald J. DeBacker is the father of said child and Josephine A. DeBacker is the mother of said child and that they reside at 160 Jefferson, Fremont, Dodge County, Nebraska, with said minor child.

WHEREFORE, your petitioner prays that a hearing be had at a time and place to be fixed by the court and that the court cause summons to be issued to Donald J. DeBacker, father of said child and Josephine A. DeBacker, mother of said child, and Clarence J. DeBacker, said minor child, notifying them of the time and place of said hearing and that upon said hearing said child be dealt with and cared for according to law and the duty of the State in the premises.

/s/ Richard D. Kuhlman

STATE OF NEBRASKA)
) ss.
COUNTY OF DODGE)

RICHARD L. KUHLMAN, being first duly sworn, on oath deposes and says that he is the duly elected, qualified and acting County Attorney in and for Dodge County, Nebraska; that he has executed the above and foregoing Petition and the facts contained therein are true as he verily believes.

/s/ Richard D. Kuhlman

SUBSCRIBED in my presence and sworn to before me this 15th day of February, 1968.

/s/ Minnie Lewis
Notary Public

[SEAL]

IN THE COUNTY COURT OF DODGE COUNTY, NEBRASKA

BEFORE RICHARD C. MOREHOUSE,
JUDGE OF THE JUVENILE COURT OF SAID COUNTY

Case No. 49

Transcript of Hearing Held at Fremont, Nebraska March 28, 1968—11:30 a.m.

IN THE INTEREST OF CLARENCE J. DEBACKER,
A Child Under Eighteen Years of Age

APPEARANCES

Richard L. Kuhlman, County Attorney in and for Dodge County, Nebraska,

For the State.

Kerrigan, Line & Martin, of Fremont, Nebraska, by Wm. G. Line,

For Clarence J. DeBacker.

HON. RICHARD C. MOREHOUSE, Presiding.

DERROLD S. MCCARDLE,
Official Court Reporter.

[fol. 1] MR. KUHLMAN: If the Court please, this is Case Number 49 entitled In the Interest of Clarence J. DeBacker, A Child Under Eighteen Years of Age. The petition in this matter was filed on the 15th day of February, 1968 and on the same date a summons was issued setting the 26th day of February, 1968 at 1:30 o'clock, p.m. for hearing, and on the 16th day of February, a copy of the summons and the petition was served on Josephine A. DeBacker by personally delivering to her a true and certified copy thereof with all endorsements thereon. And on the same date, Clarence J. DeBacker was served by leaving at his usual place of residence a true and certified copy with all endorsements thereon, and on the 17th day of February, 1968 a copy was served on

Donald J. DeBacker by leaving at his usual place of residence a true and certified copy with all endorsements thereon, by Darold Brand, Deputy Sheriff.

Let the records show that this hearing is being held in excess of twenty-four hours since the service of the summons and copies of the petitions on the parties concerned. The hearing was continued from time to time and was reset for today by agreement between attorney for the State and attorney for the Minor Child.

Does the Minor Child wish to have the petition read [fol. 2] to him at this time?

MR. LINE: I would like to make a preliminary statement, your honor.

First the Defendant objects to the jurisdiction of the court in these proceedings for the reason that the Juvenile Court Act denies the Defendant a right to a jury trial in a case such as this where he is charged with violating the forgery statute of the state and the Defendant believes that the denial of his right to a jury trial violates his rights under the Sixth Amendment to the Constitution of the United States, the right to a trial by jury, and the Defendant demands a jury trial and alleges that the Juvenile Court Act insofar as it proports to deny him a jury trial violates the Sixth Amendment to the Constitution of the United States and the due process clause under the Constitution of the United States.

As far as a reading of the complaint is concerned, the Defendant will waive it because as his counsel I have examined it, and do you understand that this complaint charges you with possession of a forged check?

CLARENCE DEBACKER: Yes.

MR. LINE: Do you have any questions about what is here charged against you?

CLARENCE DEBACKER: No.

MR. KUHLMAN: Does the Juvenile admit that the [fol. 3] facts set out in the petition are true?

MR. LINE: The Juvenile denies the facts set out in the petition.

MR. KUHLMAN: Are you prepared to proceed at this time with the hearing?

MR. LINE: Subject to the objection I dictated into the record, yes.

[fol. 4] ELGA SANDERSON

Called as a witness in behalf of the State and being first duly sworn, testified in chief as follows:

DIRECT EXAMINATION

BY MR. KUHLMAN:

Q Will you give the court your name?
A Elga Sanderson.
Q And where do you live Mrs. Sanderson?
A I live in Wahoo.
Q And were you in employed in Fremont at one time?
A Yes sir.
Q. And where was it that you worked?
A O. P. Skaggs Store on Main Street.
Q And were you working there on the 26th day of January, 1968?
A Yes sir.
Q And what were your duties at that time?
A I was cashier.
Q And what did you do as cashier?
A I checked groceries.
Q And received payment for the groceries?
A Yes.
Q And did you have authority to accept checks that were given for the groceries?
A Yes.

[fol. 5] Q I will hand you what the court reporter has marked for identification as Exhibit "1" and ask you if you know what that is?
A You mean the check?
Q Yes.
A A check made out to O. P. Skaggs for $30.00 for food.
Q Did you receive that check?
A Yes.
Q And on what date did you receive it?
A The day that it is dated?
Q The 26th of January?
A Yes.

Q And where was it that you received this check?
A At the O. P. Skaggs Store on Main.
Q And who was it that brought the check in and presented it to you?
A That boy. (Indicating)
MR. KUHLMAN: Let the records show that she is pointing to Clarence J. DeBacker.
Q And what was said at the time he presented the check, if you know?
A Well, he had a little over fifteen—fourteen dollars worth of groceries and he got the balance back in change and I asked him if it was his father's signature and he told me that it was. So I accepted the check.
[fol. 6] MR. KUHLMAN: That is all.

CROSS EXAMINATION

BY MR. LINE:

Q Had you previously been acquainted with the DeBacker boy?
A Not him personally, no, but his father and mother, yes.
Q You knew both his father and mother?
A Yes.
Q Were you familiar with his father's signature?
A Not exactly, no sir. But I had taken checks from his father.
MR. LINE: That is all.
MR. KUHLMAN: That is all.

[fol. 7] WESLEY C. HOMES

Called as a witness in behalf of the State and being first duly sworn, testified in chief as follows:

DIRECT EXAMINATION

BY MR. KUHLMAN:

Q Would you give the Court your name?
A Wesley C. Homes.
Q And where do you live?

A 1959 Pine, Fremont.
Q And what is your occupation?
A Police Officer, Police Department.
Q And how long have you been with the Fremont Police Department?
A 7 years now.
Q Do you have any special training or special assignment with the Fremont Police Department?
A Yes sir I do.
Q And what is that?
A I am a Detective Sergeant in the Detective Bureau.
Q And how long have you been assigned to the Detective Bureau?
A Two years.
Q And what have your duties consisted of?
A Investigational type of work in criminal matters.
Q Prior to going into the detective bureau, what did your duties consist of?
[fol. 8] A Regular routine police work, traffic and things like this.
Q Did you have any experience in law enforcement prior to the time you joined the Fremont Police Department?
A Yes sir, I did.
Q And what was this?
A I was in the Air Force, in the Air Police Squadron for four years.
Q I don't know if I asked you this, but how long have you been with the Fremont Police Force over all?
A Seven years now.
Q Did you have any contact with Clarence J. DeBacker on the 6th of February, 1968?
A Yes sir, I did.
Q And where did this take place?
A At the police station here in Fremont.
Q Then did you make any record of the time that you talked to him?
A Yes sir, I did.
Q I will hand you what the court reporter has marked as Exhibit "2" and ask you if that is the record that you made at that time?

A Yes sir it is.

Q And what time was it that you talked to him?

A This was at 2:50 p.m. on the 6th of February 1968.

[fol. 9] Q And at that time would you relate what the conversation was that you had with him?

A I introduced myself as a police officer of the Fremont Police Department and I advised him of certain rights which he had.

Q What were these rights?

A That any person in your circumstances has a right to remain silent; that is, you do not have to tell me anything if you do not want to. Do you understand this?

Q What was his answer?

A Yes. Anything that you do tell me, or any other officer, when you visit with me or when you give me a statement, or if you volunteer any information to me, can be used against you in a court of law, do you understand this?

Q And what was his answer?

A Yes. You have a right to have your attorney present while I am talking to you, if you would like. Do you understand this?

Q And what was his answer?

A Yes. If you do not have funds to hire an attorney, you are entitled to have an attorney appointed for you to be present while I am talking to you. Do you understand this?

Q What was his answer?

A Yes. And an appointed lawyer is appointed by the [fol. 10] court, and paid by the county to represent you. Do you understand this?

Q What was his answer?

A Yes. Right now you can waive these rights, if you wish, or you can insist on them. Do you understand this?

Q What was his answer?

A Yes. If you waive these rights now, you can insist on them at any later time. Do you understand this?

Q What was his answer?

A Yes. At this time do you wish you waive your right to remain silent and your right to have an attorney here and visit with me and give me a statement about this matter?

Q What was his answer?
A Yes.
Q Did you then take a statement from him?
A Yes sir I did.
Q I will hand you what the court reporter had marked as Exhibit "3" and ask you if that is the statement that you took from Clarence J. DeBacker?
A Yes sir, this is a carbon copy of it, of the statement which I took from him.
Q What time did you begin the statement?
A I began the statement at 3:08 p.m.
Q What time did you complete it?
A 3:15 p.m., February 6, 1968.
[fol. 11] Q And what was the procedure that you used in taking the statement?
A I would ask him questions and type down what he told me on the typewriter.
Q You sat there at the typewriter filling this out and writing out the statement as you asked him about the matters contained in the statement, is this correct?
A Yes sir.
Q And after you completed the statement did he read the statement over?
A Yes sir he did.
Q And did he make any corrections?
A Not on this statement, no.
Q And after he read it, did he sign this statement?
A Yes sir he did.
Q And was this in your presence that he signed this?
A Yes sir, it was.
Q And then you signed the statement too, in his presence?
A As a witness, yes sir.
Q Did you show him the check, Exhibit "1"?
A Yes sir, I did.
Q And did he identify this as having been written by him?
A Yes sir he did.
MR. KUHLMAN: I would like to offer in evidence, Exhibits "1", "2" and "3". I do have one more founda-
[fol. 12] tion question.

Q I noticed the lapse of time between the waiver of rights at 2:50 p.m. and the beginning of the statement at 3:08. Was there any other statement or was there another statement with reference to another matter that was taken prior to that time?

A Yes sir there was.

Q And off hand, do you know the times of this or do you know what record was kept of the times that it took to take the prior statement?

A There was a record kept, yes. That statement would have been started at 2:55 p.m. and completed at 3:05 p.m. on the same date, February 6, 1968.

Q This is what transpired between the time of the waiver of his rights and taking of the statement, Exhibit "3"?

A Yes sir, it was.

MR. LINE: Wes, were either one of Clarence's parents present when he made this statement?

THE WITNESS: His father was there but he wasn't in the room, no sir.

MR. LINE: Did he know his father was there or did you tell him his father was there?

THE WITNESS: He knew his father was there.

MR. LINE: How do you mean he knew his father [fol. 13] was there?

THE WITNESS: I think he probably talked to him prior to coming in to see me.

MR. LINE: Did you see him talk to him before that?

THE WITNESS: No, I can't say that I did.

MR. LINE: You don't know whether he knew his father was there or whether he had talked to his father?

THE WITNESS: I think he knew his father was there because he talked to him. His father came in the room right afterwards and sat there with us in the room.

MR. LINE: What I am asking you, is before the statement was given. Do you know whether he knew his father was there?

THE WITNESS: I don't know, no.

MR. LINE: And you don't know whether he talked to his father or knew his father was around before he gave you this statement?

THE WITNESS: I don't know if he knew that.

MR. LINE: Did you tell him or anything that his father was around?

[fol. 14] THE WITNESS: No, he never asked.

MR. LINE: Did he ask about talking to any one of his parents before he talked to you?

THE WITNESS: No, he didn't.

MR. LINE: Had you made any effort to get in contact with either one of his parents before you took the statement from him?

THE WITNESS: I had talked to his father before, prior to this, but on this particular day, no.

MR. LINE: So you made no effort to tell either one of his parents that you were going to take a statement from him concerning this check?

THE WITNESS: Mr. DeBacker knew that I was going to talk to him.

MR. LINE: You had told Mr. DeBacker that you were going to talk to his son?

THE WITNESS: He knew when he came in to visit with me that we were going to visit with his son.

MR. LINE: Did you tell Mr. DeBacker that you were going to talk to his son about a forged check?

THE WITNESS: He knew this, yes sir.

MR. LINE: That is not the question I asked you. Did you tell him?

[fol. 15] THE WITNESS: Not on this particular day no.

MR. LINE: Did you ever tell his father prior to your taking a statement from Clarence that you were going to take a statement from him concerning this check?

THE WITNESS: Yes sir, I did.

MR. LINE: When?

THE WITNESS: I would have to look back into the report to see the date on this.

MR. KUHLMAN: Could I hand him this report to refresh his recollection?

MR. LINE: Yes.

THE WITNESS: This would have been on the 6th of February, 1968 at 2:20 p.m.

MR. LINE: This statement shows it was taken on February 5th—excuse me. Strike that. I misread the date of birth. You say that on February 6th at what time—2:20 p.m.?

THE WITNESS: Yes.

MR. LINE: You informed his father of what?

THE WITNESS: That I would be talking to his son.

MR. LINE: Did you tell him what about?

THE WITNESS: About these checks.

[fol. 16] MR. LINE: Where did you tell him that?

THE WITNESS: That would have been at the police station.

MR. LINE: Was his son there then?

THE WITNESS: No, not at that time.

MR. LINE: What did he say?

THE WITNESS: He said I could talk to him.

MR. LINE: Where was Clarence then?

THE WITNESS: I don't know. I don't know where Clarence was.

MR. LINE: How did he get to the police station—did you take him there?

THE WITNESS: I think I probably asked him to come down to the station.

MR. LINE: Do you know whether he and his father came to the station together or anything like that?

THE WITNESS: I don't remember, no sir.

MR. LINE: The Defendant objects to the admission of Exhibit "3", his statements, for the reason that the statement says that is might be used against the Defendant in a criminal proceedings, and it now is being introduced in what is denominated by the Juvenile Court Act as a civil proceedings. There is no showing that the De-

[fol. 17] fendant, a 17 year old boy, made a competent or intelligent waiver of counsel. No showing that he had the opportunity to consult with his parents, and no showing that the statement was a voluntary one. The same objection is made to Exhibit "2". And no proper and sufficient foundation laid for the admission of Exhibit "1", the check.

MR. KUHLMAN: I would like to ask two more questions.

Q Was the statement, Exhibit "3", voluntarily given to you, were there any threats made in order to obtain this Exhibit "3"?

A No, there wasn't.

Q As the statement was voluntary?

A Yes, it was.

Q And did Clarence ask at any time to talk to his parents, to either of his parents, either before or during the time you were taking his statement?

A No, he didn't.

MR. KUHLMAN: I will renew my offer of Exhibits "1", "2", and "3".

MR. LINE: The same objection.

THE COURT: I will overrule the objections.

Q In which county is the O.P.Skaggs Store on Main Street?

[fol. 18] A Dodge County.

Q And what are his parents' names?

A Donald and Josephine DeBacker.

MR. KUHLMAN: That is all.

MR. LINE: I have no further questions of this witness.

(Witness excused)

[fol. 19] MR. KUHLMAN: It is stipulated between the State and Clarence DeBacker, A Child Under 18 Years of Age, that if Donald J. DeBacker, his father, were called to testify they he would testify substantially as the statement given to Officer Homes which has been identified as Exhibit "4".

MR. LINE: That stipulation is satisfactory subject to my original objection to the jurisdiction of the Court. I don't want this to be considered as waiving any constitutional rights.

MR. KUHLMAN: This is all I have with reference to the charge itself. As far as disposition, after the Court has made his determination of delinquency I would like to be heard some further at that time. For the purpose of the hearing on determining whether or not he is a delinquent child the State will rest.

MR. LINE: The Defendant has no evidence.

THE COURT: You want to be heard further after the finding?

MR. KUHLMAN: Yes. It has to do with disposition.

THE COURT: I will overrule the objection to the jurisdiction of the court made by the minor child and find that Clarence J. DeBacker is a delinquent child.

MR. KUHLMAN: Clarence is one of several children [fol. 20] that were given to Catholic Charities in a divorce action at the request and instance of the father a number of years ago and Clarence at that time was too old to adopt. His brothers and sisters were all adopted out. He was placed in Boys Town at one time and in 1967 he ran away and was involved in stealing cars and they felt that they could not control him and felt that they should return him to court and let the court return him to his parents or whatever the court saw fit to do. This was done. He was returned to court and the court returned the custody of Clarence to the parents and since that time Clarence, which was a little less than a year ago, Clarence has been involved in a number of scrapes with the law. On August 4, 1967 he was fined $26.00 and costs in Justice Court on a charge of reckless driving. On August 17, 1967, he was fined $11.00 and costs in Police Court under a charge of disturbing the peace. October 9, 1967, he was fined $46.00 and costs in Justice Court on a reckless driving charge. On February 17, 1968, he was fined $1.00 and costs in Police Court for an improper muffler. On March 2, 1968 he was fined $11.00 and costs in Police Court for speeding. On the 2nd of March, 1968 he was fined $6.00 and costs in Police Court for failure to stop at a stop sign. On March 2, 1968 he was fined $21.00 and costs in Police Court for speeding 50 miles an hour in a 25 mile [fol. 21] an hour zone. I don't have the records here just in the last fifteen to twenty days, he was in Justice Court again for reckless driving and was fined and was sentenced to ten days in jail. He was at that time sent to jail to lay out the jail sentence and the balance of the fine after having laid out the jail sentence. He was arrested also on a charge of auto theft which was changed by me to a petit larceny complaint and the matter was continued in the hope that Clarence might get himself straightened out.

This auto theft occurred on the—he was arrested on the 17th of July 1967 on this and this case I believe is still pending in the court as a petit larceny complaint. And assault and battery complaint was filed against him which was later amended to an assault case. A menacing threats case is still also pending in this court on the criminal docket. He has an improper left turn charge pending in Police Court which has been continued by the court indefinitely. It was set for hearing on the third day of January, 1968 and at that time the court continued the case indefinitely, and there has been no disposition since that time.

I think that for the sake of Clarence that he needs a closer supervision than his parents can ever give him. And unless he is given that close supervision, the next thing he will graduate to a criminal complaint and prob- [fol. 22] ably rather than be sent to Kearney or some institution such as this he would go to the Men's Reformatory in Lincoln. His attitude seems to be that he will do just as he pleases. He has indicated a utter disregard for all the traffic laws and this is getting into the area now of other criminal laws. Where he begins forging checks in order to get what he wants. I don't have available to me the school records. This young man does have a relatively high I.Q. and it seems a terrible waste of humanity to let this thing go on and take the course that it is apparently starting to take. He is going to end up in the penitentiary and it will be a waste of this young man's life. The only thing the court can do here is to commit this young man to the Boy's Training School at Kearney where he can receive the close supervision and guidance that he needs in order to see him through this area.

MR. LINE: First, may it please the Court, I would like to make an objection for the record to Mr. Kuhlman's reference to other offenses, because they are not contained in the complaint filed against the Defendant and I would like to have a ruling on that objection and after the Court's ruling I will make a brief statement on the Defendant's behalf.

THE COURT: I will overrule the objection.

[fol. 23] MR. LINE: May it please the Court. I would like to suggest that since Clarence has been at Boy's Town that consideration be given to placing him back there because the situation at Kearney, which we all read about in the papers and there has been so many statements in the public press lately, makes me wonder whether it is an appropriate place to send any child, no matter what he has done.

THE COURT: What is the policy down there on a boy that has been there once, will they take him back again?

MR. KUHLMAN: Perhaps with reference to his going back to Boy's Town, I doubt very seriously they would take him back, because at the time they turned him back to the court here the Catholic Charities turned him back because they were no longer able to control him with the situation that they had there at Boy's Town. I feel it would be a mistake to send Clarence to Boy's Town because I don't feel that they can give him the close supervision this young man needs at this time.

MR. LINE: Father Farrald, the guidance counselor, indicated to me two or three months ago he would be interested in working with Clarence again. Whether or not he would feel this way at this time, I can't say for certain.

[fol. 24] THE COURT: I am going to order Clarence J. DeBacker, order his commitment to the Boy's Training School at Kearney, Nebraska, but I suppose he will have to complete the jail sentence that he is in the Dodge County Jail for now.

MR. KUHLMAN: This is up to the court.

THE COURT: I will commit him immediately to the Boy's Training School at Kearney.

- The End -

IN THE COUNTY COURT OF DODGE COUNTY, NEBRASKA

BEFORE RICHARD C. MOREHOUSE,
JUDGE OF THE JUVENILE COURT OF SAID COUNTY

IN THE INTEREST OF CLARENCE J. DEBACKER,
A Child Under Eighteen Years of Age

ORDER—March 29, 1968

Now on the 28th day of March, 1968, this matter came on for hearing on the petition filed herein, said minor child being present in court with his attorney, William G. Line. The record discloses that due and legal service of summons, and a copy of the petition, were had on said minor child and his parents more than twenty-four hours prior to the hearing and that the date and time of the hearing was arranged by agreement of counsel for the State and said minor child.

Said minor child, through his attorney, objected to the jurisdiction of the court for the reason that said minor child by statute is not entitled to a trial by jury and said minor child, through his attorney, made a demand for trial by jury on the matter, which was overruled and refused by the court.

Said minor child, through his attorney, waived the reading of the petition, said minor child indicating that he understood the allegations set out in the petition. Said minor child, through his attorney, denied the facts set forth in the petition.

Whereupon witnesses were sworn and evidence adduced and at the conclusion thereof the court finds that Clarence J. DeBacker is a delinquent child within the meaning of Section 43-201(4) of the Revised Statutes of Nebraska for 1943, as amended, and further that he should be committed to the Department of Public Institutions and that he should be taken by the Sheriff of Dodge County, Nebraska, to the Boys' Training School at Kearney, Nebraska.

IT IS THEREFORE ORDERED that Clarence J. DeBacker is a delinquent child and that he be and hereby is committed to the Department of Public Institutions of the

State of Nebraska and that he shall be taken by the Sheriff of Dodge County, Nebraska, to the Boys' Training School at Kearney, Nebraska, and there turned over to the Department of Public Institutions.

Signed this 29th day of March, 1968.

/s/ Richard C. Morehouse
Juvenile Judge

[SEAL]

IN THE DISTRICT COURT
OF DODGE COUNTY, NEBRASKA

CLARENCE J. DEBACKER, PETITIONER

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—
Filed April 3, 1968

Petitioner shows to the court:

1. Petitioner is held in respondent's custody by virtue of order of commitment, a copy of which is marked Exhibit A and is attached hereto and is incorporated by reference herein, issued out of the County Court of Dodge County, Nebraska, under the provisions of the Nebraska Juvenile Courts Act, Sections 43-201 to 43-220, RRS Supp. 1965.

2. Petitioner is unlawfully deprived of his liberty as the proceedings leading to his commitment violated his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States in the following particulars:

A. Section 43-206.03 RRS Supp. 1965 violates the due process clause of the Constitution in that said section requires the juvenile court to make a finding and adjudication that petitioner violated a law of this state on a perponderence of the evidence only and does not require

that a finding that petitioner violated a law of this state be based upon evidence sufficient to convince the trier of fact beyond a reasonable doubt.

B. Said section 43-206.03 prevents the application of the protective rules of criminal procedure and requires the application of the vague and uncertain standard of "the customary rules of evidence in use in civil trials without a jury in the District Court."

C. Said Section 43-206.03 denies petitioner a jury trial of the issue of his alleged violation of a law of this state, in this case a felony, in violation of petitioner's right to a jury trial under the Sixth Amendment to the Constitution of the United States.

3. Petitioner is deprived of his liberty under the Fourteenth Amendment of the Constitution of the United States when his right to a jury trial and the protective procedures of the criminal code are left to depend on the uncontrolled discretion of the prosecutor as to whether petitioner should be proceeded against in juvenile court or should be informed against in District Court under the provisions of the code of criminal procedure.

CLARENCE J. DEBACKER,
Petitioner,

By KERRIGAN, LINE & MARTIN
His Attorneys

STATE OF NEBRASKA)
) ss
COUNTY OF DODGE)

Clarence J. DeBacker, being first duly sworn, deposes and says that he has read the foregoing petition, knows the contents thereof, and the facts therein contained are true as he verily believes.

/s/ Clarence J. DeBacker

Subscribed and sworn to before me this 3 day of April, 1968.

/s/ W. G. Line
[SEAL] Notary Public

IN THE DISTRICT COURT
OF DODGE COUNTY, NEBRASKA

CLARENCE J. DEBACKER, PETITIONER

- vs -

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,
RESPONDENT

RETURN AND ANSWER TO WRIT—Filed April 4, 1968

Homer Branard, for answer and return to said writ, states that Clarence J. DeBacker, on the 29th day of March, 1968, was placed in his custody as sheriff of said county, by virtue of an order of the Juvenile Judge, a copy of which is marked Exhibit "A" and is attached hereto and incorporated by reference herein, and that he now holds the said Clarence J. DeBacker in custody by virtue of said order for transportation to Kearney, Nebraska, there to be turned over to the Department of Public Institutions in pursuance of the order. In obedience to the writ of habeas corpus issued herein he now produces the body of the said Clarence J. DeBacker before the court to be dealt with according to law.

For further answer and return to said writ, said Homer Brainard does expressly deny that Section 43-206.03, Reissue Revised Statutes of Nebraska Supplement of 1965 violates the Sixth and Fourteenth Amendments to the Constitution of the United States in any way, but that said Statute is a valid and subsisting statute in all respects and that the detention of the said Clarence J. DeBacker is in all respects lawful.

Dated this 4th day of April, 1968.

/s/ Homer Brainard
Sheriff of Dodge County,
Nebraska

IN THE DISTRICT COURT
OF DODGE COUNTY, NEBRASKA

CLARENCE J. DEBACKER, PETITIONER

- vs -

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,
RESPONDENT

ORDER—April 10, 1968

Now on this 10th day of April, 1968, this matter came on for hearing, the Petitioner appearing by William G. Line, his attorney, and the Respondent appearing by Richard L. Kuhlman, Dodge County Attorney.

Evidence was adduced and the court finds that the petitioner's petition filed herein should be dismissed.

IT IS THEREFORE ORDERED that the petitioner's petition filed herein be and hereby is dismissed.

Signed this 10th day of April, 1968.

BY THE COURT:

s [Illegible]
District Judge

IN THE SUPREME COURT OF NEBRASKA

No. 36989

CLARENCE J. DEBAKER, APPELLANT

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, APPELLEE

Appeal from the District Court for Dodge County

JUDGMENT—October 4, 1968

This cause coming on to be heard upon appeal from the district court of Dodge county was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at $; for all of which execution is hereby awarded and that a mandate issue accordingly.

Opinion Per Curiam

McCown, Judge, joined by Spencer, Boslaugh and Smith, Judges. Carter, Judge, joined by White, Chief Justice and Newton, Judge. Spencer, Judge, joined by Smith, Judge.

PAUL W. WHITE,
Chief Justice

IN THE SUPREME COURT OF NEBRASKA

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCown, and Newton, JJ.

PER CURIAM.

The petitioner was found to be a delinquent child and ordered committed to the Boys' Training School at Kearney. The facts alleged as the basis for the charge of delinquency constituted the crime of forgery if he had been charged under the general criminal laws. Petitioner asserts that section 43-206.03, R. S. Supp., 1967, a part of the Juvenile Court Act, is unconstitutional in that it denies him the right of a jury trial, and applies a "preponderance of the evidence" rule rather than a "beyond a reasonable doubt" rule to the adjudication of delinquency.

Four judges are of the opinion that the statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional. Article V, Section 2, Constitution of Nebraska, provides in part: "No legislative act shall be held unconstitutional except by the concurrence of five judges."

The petition for habeas corpus here was dismissed by the district court. That judgment must, therefore, be affirmed.

AFFIRMED.

McCOWN, J., joined by SPENCER, BOSLAUGH, and SMITH, JJ.

The constitutional rights of juveniles and the developing ramifications of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (May 15, 1967), are at issue here. By habeas corpus, the petitioner, a 17-year-old minor, sought his discharge from the custody of the Dodge County sheriff under an order committing him to the Boys' Training School of Kearney. The denial of a jury trial and the statutory application of a preponderance of the evidence rule rather than the beyond a reasonable doube rule are the basis of the constitutional challenge.

The county attorney filed a petition in the Dodge County court within its juvenile jurisdiction charging that Clarence J. DeBacker, a minor 17 years of age, was a delinquent child within the meaning of section 43-201(4), R. S. Supp., 1967. The basis for the charge of delinquency was the possession of a forged check with intent to utter it as genuine. The facts alleged in the petition constituted the crime of forgery under section 28-601(2), R. R. S. 1943, if he had been charged under the general criminal laws. The penalty for violation of that section is imprisonment in the Nebraska Penal and Correctional Complex not exceeding 20 years nor less than 1 year and a fine not exceeding $500.

The check bore the signature "Donald J. DeBacker," petitioner's father, and was given to the O. P. Skaggs store for groceries on January 26, 1968. The check was passed by the petitioner who said his father's signature was on the check. Petitioner's father and mother were known to the clerk at the store who had taken checks from petitioner's father previously. Petitioner, after full and complete Miranda warnings, gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for the petitioner and needed more food. His mother was very jittery and told petitioner to sign his father's name to a check blank which she had given him. Petitioner's mother assured him that it was all right for him to go ahead and write the check so he did so, signing his father's name. Petitioner and his mother went to the store and petitioner went in and got groceries and approximately $10 change. It was stipulated that petitioner's father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check; and that he told the police perhaps his wife and petitioner may have had something to do with the check.

Before the proceedings commenced, petitioner objected to the jurisdiction of the court because of the denial of his right to a jury trial. At the conclusion of the evidence, the county judge, as judge of the juvenile court, overruled the objection to the jurisdiction of the court, and found

that petitioner was a delinquent child. Thereafter, the court ordered the petitioner committed immediately to the Boys' Training School at Kearney. Habeas corpus relief was denied by the district court, and this appeal followed.

Some background is necessary to provide a frame of reference for the constitutional issues raised here. Until the turn of the century, juveniles in the United States were generally treated as adults insofar as the criminal law was concerned, and, of course, had the same constitutional rights as adults. With the advent of juvenile court acts, which began in Illinois in 1899, the system of juvenile courts spread to every state in the union. The theory was that for their misconduct, children should not be handled, treated, or punished in the same fashion, nor under the same processes and procedures, as adult criminals. The theory also was that a child should not be determined to be guilty or innocent of criminal conduct and there should be a broad range of rehabilitation procedures. In brief, the juvenile court procedures were regarded as being beneficial to the child, and intend to remove and discard the technicalites of substantive and procedural law for adults. Over 40 states have upheld the constitutionality of juvenile court laws erected on such concepts. Nebraska was one. See State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804 (1913). In that case, our court took the same approach as other states, and based the validity of the Juvenile Court Act on the doctrine of parens patriae. The state, through the juvenile court, was merely performing the duty of seeing that the child was properly cared for. The problems involved in denying to a juvenile the constitutional protections afforded to an adult charged with crime were avoided simply by declaring that the juvenile court procedures was civil rather than criminal in nature. This court said in State ex rel. Miller v. Bryant, *supra*: "The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help."

Some of the juvenile court acts made the jurisdiction of the juvenile court exclusive, and some provided for a

waiver by the juvenile court to the adult criminal court. The Nebraska pattern created a concurrent jurisdiction as to criminal misconduct, and enabled the county attorney to determine whether to file an action under the general criminal laws of the state, or a delinquency proceeding in the juvenile court. See, State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101; Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240.

At its inception in 1905, and until 1963, the Nebraska Juvenile Court Act, with respect to jury trials in juvenile court, provided: "In all trials under this act where a delinquent child is charged with crime, any person interested therein may demand a jury or the judge of (on) his own motion may order a jury to try the case; * * *." See Laws 1905, c. 59, s. 2, p. 306, now s. 43-202, R. R. S. 1943.

This specific provision for a jury trial was effectively eliminated by this court. We held that charging a child with being delinquent did not charge him with a crime, even though the facts alleged would have constituted a specific charge of crime if made against an adult. Such charges, we said, merely set forth the necessary facts showing him to be delinquent. See Laurie v. State, 108 Neb. 239, 188 N. W. 110.

This position was reaffirmed on many occasions. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72 (1963). It should be noted that in the Hans case, Chief Justice Simmons specifically dissented from that part of the court's opinion that approved the denial of a jury trial. He stated in that dissent: "By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide."

In 1963, in an extensive recodification of the Juvenile Court Act, the provision for jury trials was removed. Section 43-206.03, R. S. Supp., 1967, now provides in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules

of evidence in use in civil trials without a jury in the district courts.

"(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child."

Section 43-201, R. S. Supp., 1967, now establishes four different subdivisions: Dependent child, neglected child, delinquent child, and a child in need of special supervision.

This pattern was only typical of what happened in all the states. Form swallowed substance, and semantics disposed of the constitutional rights of juveniles charged with being "delinquent." The basic assumption that an adjudication of "delinquency" was in no sense criminal but only civil was reflected by both courts and legislatures. The result was that a child charged in juvenile court with misconduct which would have been criminal if he had been an adult became, in effect, a constitutional nonperson. And then came Gault!

In In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, it was stated: "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."

The Gault case, which applied the due process standard to juvenile proceedings involving the adjudication of delinquency, was foreshadowed in Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). That case held that the hearing in juvenile court to waive the "exclusive" jurisdiction of the juvenile court to the adult criminal court under a District of Columbia statute must measure up to the essentials of due process and fair treatment.

In re Gault has spawned an almost unending volume of comment. The holding in Gault refers only to the adjudicatory stage of the juvenile court process—the adjudication of delinquency where commitment to a state institution may follow and when the proceedings may result in incarceration in an institution of confinement. It does not require that juveniles be handled as adults, nor does it affect the dispositional process after an adjudication of delinquency. It clearly does not apply to procedures involving neglected or dependent children, nor to any proceeding except those by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to the area of adjudication of delinquency circumscribed by Gault, it does require that the process must meet the standards of due process. We believe that an implicit foundation for the holding in Gault is the conclusion that juvenile proceedings, to declare a juvenile "delinquent" as a result of his own misconduct are at least sufficiently criminal in nature that the constitutional rights involving due process in criminal cases must be applied. The due process requirements spelled out in Gault do not pass upon the issue of whether or not the right to a jury trial is a fundamental part of that due process. The problem here is whether the right to a jury trial is an essential part of due process in the area of adjudication of delinquency outlined by Gault.

So far as present research indicates, since the Gault decision, three states have passed upon the issue of whether a juvenile has a constitutional right to a jury trial in juvenile court at the adjudicatory stage of the juvenile court process of determining delinquency. Two

of these cases have denied such right and one has upheld it on the basis of a statutory interpretation.

Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (Sept. 15, 1967), held that denial of a jury trial to a juvenile on charges of rape, assault with intent to ravish, assault and battery, and indecent assault was not violative of the juvenile's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The court relied heavily on the fact that the United States Supreme Court had never held that the right to trial by jury was a fundamental part of due process imposed upon the states through the Fourteenth Amendment. The court also conceded that the change of the name of the offense from "rape" to "delinquency" did not of itself affect the constitutional right of the accused to a trial by jury.

Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (March 5, 1968), held that jury trial in a juvenile delinquency proceeding was not a constitutional requisite. The Washington court relied upon the Johnson case and also concluded that Gault should not be considered as a mandate incorporating the right to a jury trial within the fundamental essentials of due process, and also reaffirmed its previous conclusion that the Washington constitutional requirements as to trial by jury were applicable only to criminal prosecutions, and that juvenile court proceedings should not be considered criminal.

Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (Feb. 26, 1968), held that under the New Mexico juvenile court statute, a juvenile charged with violation of a state law is entitled to a trial by jury in juvenile court if there is no certification to district court and if the offense is one which would be triable by a jury if committed by an adult.

All of these cases were decided prior to Duncan v. Louisiana, ___ U. S. ___, 88 S. Ct. 1444, ___ L. Ed. 2d ___, decided May 20, 1968.

In Duncan, for the first time, the Supreme Court held that the right to jury trial in serious criminal cases is a fundamental right, and hence must be recognized by the states as a part of their obligation to extend due process of law to all persons within their jurisdiction. While

Duncan avoids any clear-cut holding as to what will constitute a serious criminal case, it does indicate quite obviously that the dividing line may depend upon the maximum possible time of imprisonment provided as a penalty. It also indicates that the present federal rule of 6 months may be the appropriate measure.

In re Whittington was disposed of on the same date on which Duncan was decided. Whittington involved the issues of the right to trial by jury and standards of proof in adjudications of juvenile delinquency. Because of an intervening order binding the juvenile over for trial as an adult, the Supreme Court did not pass on the issues. It did, however, vacate the judgment and remand the cause to the Ohio court for consideration in light of Gault. See In re Whittington, —— U. S. ——, 88 S. Ct. 1507, —— L. Ed. 2d —— (May 20, 1968).

If Gault is ultimately interpreted as meaning that any juvenile court proceeding to determine "delinquency" is a "serious" case because the child might be subjected to the loss of his liberty for more than 6 months, then every adjudication of juvenile delinquency would give rise to a constitutional right to a jury trial. Some language in Gault might be so interpreted. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." In re Gault, *supra*, p. 36.

However, Gault did not impose the requirement of a jury trial as a part of due process in adjudications of delinquency. This omission might rest on two obvious facts. Duncan had not yet been decided, and, in Gault, the crime involved, if committed by an adult, could have resulted only in a fine of $5 to $50 or a jail sentence of not more than two months. It was, therefore, not a "serious" criminal case, and an adult would not have been entitled to a constitutional right to trial by jury, even under Duncan. Therefore, Gault could also be interpreted as meaning that even though adjudications of delinquency are at least partially criminal in nature, a juvenile is only entitled to the same constitutional right to jury trial as an

adult would be for the same actions in an adult criminal court.

The length of possible punishment may be an "objective" basis for dividing serious and petty crimes in the general criminal courts. There individual crimes are set out in dozens of variations and the punishments are applied to the specific acts constituting the individual crime. Under the Nebraska Juvenile Court Act, a "delinquent" is now defined as: "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." S. 43-201, R. S. Supp., 1967. The complete range of disposition permitted by the Juvenile Court Act may be applied to the single category of "delinquent." A correlation between juvenile court and adult criminal court as to the constitutional right of trial by jury, based solely on possible length of "punishment," presents difficult alternatives. Faced with such alternatives, we see no present justifiable reason to declare that all proceedings to determine that a child is delinquent under the Juvenile Court Act are "serious criminal cases" giving rise to a constitutional right to trial by jury under the due process clause.

Four judges, a majority of this court, are of the opinion that a juvenile charged with violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a constitutional right to a trial by jury in juvenile court if the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court. To the extent the provisions of section 43-206.03, R. S. Supp., 1967, are in conflict, we believe they are unconstitutional. This conclusion is also reinforced by the case of Nieves v. United States, 280 F. Supp. 994, decided March 5, 1968. This constitutional right, of course, may be waived, although special problems may arise with respect to waiver. See In re Gault, *supra*.

Four judges are also of the opinion that a finding of delinquency, for misconduct which would be criminal if charged against the adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. See In re Ur-

basek, 38 Ill. 2d 535, 232 N. E. 2d 716; United States v. Costanzo, 395 F. 2d 441 (4th Cir.). To the extent that those provisions of the Juvenile Court Act, section 43-206.03, R. S. Supp., 1967, incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void.

CARTER, J., joined by WHITE, C. J., and NEWTON, J.

This is an appeal from the denial of a writ of habeas corpus. The petitioner is a 17-year-old boy who sought a release from the custody of the county sheriff under an order committing him to the Boys' Training School in Kearney, Nebraska, as a juvenile delinquent. It is the contention of the petitioner that upon demand, which was made, he is entitled to a trial by jury and to have the issue of his delinquency determined under the rule in criminal cases requiring a finding of guilt beyond a reasonable doubt.

The first Juvenile Court Act was enacted in this state in 1905. The history of the act is set out in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101. Prior to 1963, the act and the amendments thereto did not provide for a trial by jury except where a delinquent minor child is charged with a crime. In 1963, the act was amended to provide in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts." S. 43-206.03, R. S. Supp., 1967.

In a delinquency case such as the one before us in which a jury was demanded and denied, this court said: "The act itself makes no provision for a trial by jury except where a delinquent child is charged with a crime. The complaint was intended to charge, and did charge, the boy with being a dependent, neglected and delinquent child. Dependent and neglected in this; that said Alton Laurie * * * has violated the laws of the state; * * * and was repeatedly guilty of operating a motor car in viola-

tion of law. It is evident the specific charges in the complaint of law violation were not made with the intent of charging him with crime, but to set forth and state the facts showing him to be a dependent, neglected and delinquent child. The statute defines dependent, neglected and delinquent child, and to bring the case within the statutory provision, it was necessary to make these allegations, and without such, or similar allegations, the petition would be subject to attack. It is not enough that the petition charge that the boy was a dependent, neglected and delinquent child, but it must go farther and set forth facts showing that he was such a child, and until such a petition was filed he would be uninformed of what he would have to meet. The petition in such cases must inform the defendant of the charge he is to meet, to enable him to prepare for his trial. And an examination of the petition brings us to the irresistible conclusion that the charge against the boy was that of delinquency. A commitment to the industrial school upon such a charge is not a conviction of a crime, or a commitment to a penal institution." Laurie v. State, 108 Neb. 239, 188 N. W. 110. In the foregoing case, Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422, is quoted with approval in part as follows: " 'The proceeding is not one according to the course of the common law in which the right of jury by trial is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situa-

tion. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered.'" See, also, Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267. The foregoing holdings of this court have remained the law of this state to the present time.

The original pleading filed in the delinquency proceeding is labeled a petition and alleges that the petitioner in the present case is a delinquent child within section 43-201(4), R. S. Supp., 1967, in that he was in the possession of a forged, false, and counterfeited bank check. I point out that petitioner was not charged with a crime, he was not and could not be tried on a criminal charge, no punishment for a crime was or could be inflicted, and the presumption of innocence as to the commission of crime is still applicable to him. It is argued here that a finding of delinquency is in practicable effect a conviction for crime in that some persons have so construed it in transactions in the market place. But there is no evidence that any court has placed any such controlling construction upon it. It cannot be logically argued that because some persons may incorrectly choose to treat the proceeding as criminal in nature it then has the effect of making it so and thus affords a basis of unconstitutionality.

The position of the members of the court who would reverse and remand place the Juvenile Court Act in an unconscionable situation even if amended to conform to their views. A delinquent child may be committed to the training school whether or not the evidence points toward the commission of a crime by the juvenile. In either event, the juvenile may be committed until his conduct has been adequately corrected or until he has been placed in a suitable environment, but in no event beyond the age of 21 years.

In other words, the corrective process is the same whether or not the supporting evidence indicates that the commission of crime may be involved. In requiring a jury trial when demanded, if there is evidence that some criminal act may be involved, the real purpose of the Juvenile Court Act is destroyed. It tosses the juvenile into a trial by jury where he is tried for all intents and purposes as a criminal when this is one of the things the Juvenile Court Act purports to eliminate. Instead of a hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, broadcasts to the world the evidence of a crime with which he has never been charged, and reinstate the evils of trying young juveniles on the same basis as adult criminals.

The purpose of juvenile courts must be reiterated here to gain a proper conception of the problem before us. The past several decades have produced a complete change in attitude of the state toward its offending children. The problem of the delinquent child is, in its social significance, of great importance for on its wise solution depends the future of our youth as responsible citizens. The present thinking is that the juvenile who has begun to go wrong, who is incorrigible, who has violated some law or ordinance, is to be taken in hand by the state through a juvenile court, under the doctrine of parens patriae, as a guardian because of the unwillingness or inability of his natural parents to guide him toward responsible citizenship. Legislation establishing juvenile courts and providing methods to deal with dependent, neglected, and delinquent children shows a modern solicitude of the law for the best interests of such children. The juvenile court is not a criminal court; it does not punish for crime. Its purpose is corrective and reformative, and its ultimate purpose by its procedures is to permit the juvenile judge to best guide and control juvenile wrongdoers, with more consideration for the future development than for their past shortcomings. The creation of such courts has been characterized as the most outstanding development in the administration of criminal justice since the signing of the

Magna Carta. 31 Am. Jur., Juvenile Courts, Etc., ss. 2 and 5, pp. 296, 297.

It is contended by the petitioner that a contrary view is required by the case of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, and the asserted judicial history of that case. It is in the consideration of this issue where I must part company with the petitioner's contention.

No fault can be found with the granting of the writ of habeas corpus for failure to comply with conventional due process, i.e., the insufficiency of the petition in charging delinquency; the failure to give notice and hearing, and matters of that nature. The issue here is whether or not juvenile acts which have been held constitutional in some 40 states in fact violate constitutional due process under the Fourteenth Amendment to the Constitution of the United States. I concede that the provisions of state juvenile acts must be complied with in accordance with their terms. The issue here does not involve any alleged failures in this respect. It may be true, and it probable is, that errors have been made by juvenile courts, but this is a condemnation of personnel and not the procedures that would justify a holding of unconstitutionality. If error in administration is a basis of a holding of unconstitutionality there would be few statutes which would escape. But the right of review for the correction of errors exists in this state and adequately protects against the ruthless administration of the act which the Gault opinion asserts as existing. The Gault opinion attacks the statutory efforts to conceal the deviational behavior of wayward juveniles as being "more rhetoric than reality." It questions the trial before a juvenile judge in affording due process by stating that "the condition of being a boy does not justify a kangaroo court," an implied criticism of juvenile judges that is wholly unwarranted. In the Gault case, the petitioner was a 15-year-old boy. The opinion indicates that the primary ground in finding him to be delinquent was the use of vile and lewd statements over a telephone, a misdemeanor for which, if convicted, would carry a penalty of $5 to $50 fine or a jail sentence for not more than 2 months. It is then asserted that under the

juvenile act he was committed to custody for a maximum of 6 years. The comparison is simply not true, unless he failue to accept correction and continues as an incorrigible juvenile. The opinion plainly states that the rights of an adult under a criminal charge exceed those of a juvenile delinquent, but here the juvenile was not charged with crime. It is completely overlooked, however, that the juvenile received many advantages because of his youth that the criminal juvenile or adult does not possess, which is the very purpose of the Juvenile Court Act. In fact, the requirement of a jury trial defeats the very purpose of the act.

But irrespective of the foregoing, the Gault case does not hold or even infer that a jury trial is essential to due process in a delinquency case, even where the supporting evidence points to criminal conduct on the part of the juvenile. The most that is said by Gault with reference to a jury trial being essential to due process in a delinquency case is the following: "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury." This latter statement is supported by Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84, wherein it is said: "Because the State is supposed to proceed in respect of the child as parens patriae and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions * * * that he is not entitled to counsel * * *. This concern, however, does not induce

us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, *and we go no further.*" (Italics supplied.)

There is no holding by the Supreme Court of the United States that due process requires a jury trial in a delinquency proceeding under a juvenile court act. Three state Supreme Courts have passed on the issue since Gault and Kent. Some reference is made to Duncan v. Louisiana, —— U.S. ——, 88 S. Ct. 1444, —— L. Ed. 2d ——, but this case is a criminal appeal in which the question of delinquency under a juvenile court act is not involved. In Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (1968), the court held that a jury trial was required under the provisions of the state statute, and is therefore not pertinent here.

In Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (1967), in dealing with the very question, that court said: "In summary, we are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through Gault, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner,

and would result in a sterile procedure which could not vary to meet the needs of delinquent children. Accordingly, we reject appellant's request for a jury trial."

In Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (1968), the court, in declining to construe Gault as requiring a jury trial in a dependency case, said: "While recognizing that in the instant case the above-mentioned requirements were met, and further that Gault did not specifically determine that jury trials are required in juvenile proceedings, petitioner nevertheless argues that, under the reasoning of Gault, a juvenile acused of an act which could lead to his institutionalization is entitled to the same procedural and constitutional rights as an adult accused of a crime, which rights would include a jury trial. * * * We do not believe that the Supreme Court's opinion in Gault, supra, is to be considered as a mandate to abandon this beneficial concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury."

Summarizing my position, the Supreme Court of the United States has never held that a jury trial is essential to due process in a delinquency proceeding under a juvenile court act. Two state Supreme Courts have held that a jury trial is not required in such cases and that Gault and Kent do not hold otherwise. Since 1905, when our first Juvenile Court Act was enacted, this court has consistently held to the constitutional validity of our Juvenile Court Act including the provisions for a nonjury trial. There is no case authority holding that a jury trial is a requirement of due process in a deliquency proceeding.

The purport of the petitioner's position is that a jury trial is required by the holdings of the Supreme Court of the United States. But that court has not so held. To hold that it has, under such circumstances, has the effect of overruling the previous holdings of this court without making reference to them and without regard to the fact that the two state Supreme Courts passing on the issue

since Gault have determined that the Gault case does not hold that a jury trial is required in a delinquency case under the due process clause of the Fourteenth Amendment to the federal Constitution. An opinion to the contrary would be supported only by its own rhetoric. Such a holding can be based only on the assumption that the United States Supreme Court will eventually hold that a jury trial in juvenile delinquency cases is required to afford due process. To this I do not subscribe since that court, with opportunities to do so before it, has declined to so hold. Agreeing with what that court may or may not do affords no basis under the rule of federal judicial supremacy to hold an otherwise valid act invalid by an less authority than peering into a crystal ball. In this process, the Juvenile Court Act, a legislative act which has been characterized as the most outstanding improvement in the administration of the affairs of delinquent juveniles in the last century, is held to effect is unconstitutional.

It is the function of this court to protect its own jurisdiction against encroachment. It is my firm opinion that this court ought not to yield up its own powers to the Supreme Court of the United States until such court has made a final and binding judgment that can be imposed on this court under the doctrine of judicial supremacy. If and when such a judgment is rendered by the Supreme Court of the United States, this court ought and will alter its position to comply therewith however much it may disagree with its soundness. But in the absence of a holding of unconstitutionality under the federal Constitution, this court is not bound by the rule of judicial supremacy, nor should it be voluntarily accepted in view of our own statute and the rule of judgment in this and other states upholding its constitutional validity.

I am not certain I am not in accordance that [illegible] and human spirit in the [illegible] of the juvenile court act existing in most of the states of the union. This court has [illegible] on statements in dicta opinions to the effect that a finding of delinquency [illegible] affect a conviction for crime, [illegible] to the criminal proceedings in favor of a civil protective proceeding, and to be "more rhetoric than reality". It is noted that the process is not provided for stating that "the condition of being a boy does not justify a hangover court", and that

juveniles are denied rights in criminal cases that are afforded to adults. I submit that a close examination of the situation reveals that these assertions simply are not true. The Supreme Court of the United States appears to be pointing toward a declaration of the unconstitutionality of the beneficient provisions of most juvenile court statutes. It appears willing to ignore the consistent holdings of constitutionality by state and federal courts over the past few decades and thereby rejects all the logic and reasoning supporting these holdings. It appears to take the position that its wisdom in this area exceeds in quality all the judicial pronouncements before it in the field of juvenile delinquency. The fact that a judge is a member of the highest court of the nation or State is not of itself proof of infallibility of decision. It might be well for members of such courts, on occasion, to step down from their ivory towers and recall with some humility that they were at the time of their appointment better than average lawyers with little judicial experience, of which there are many, who knew a President or Governor. In drafting the Constitution of the United States, our forefathers did not provide the states with a practical means of combating misconstruction of the Constitution or the encroachment of federal authority upon the sovereign power of the states. As I have before stated, it is the duty of this court to defend its own jurisdiction. The power of the pen is the only remedy left to us. When and if a decision of the Supreme Court of the United States holds the Juvenile Court Act of this state to be unconstitutional under the federal Constitution I want to make it clear that I shall recognize the power of that court to do so under the doctrine of judicial supremacy, but with the reservation of the right to protest its right to do so. But I shall neither bend the knee nor bow the head in mere interpretations, speculations, or probabilities as to what that court will eventually do. Clear and plain holdings of unconstitutionality alone require us to apply the doctrine of judicial supremacy to the holdings of the Supreme Court of the United States. Having these views, which I deem applicable to the case at bar, I concur in the affirmance of the judgment of the trial court.

SPENCER, J., joined by SMITH, J.

I am impelled to suggest that Judge Carter's opinion too casually brushes aside the impact of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, particularly when read in conjunction with Duncan v. Louisiana, ——— U. S. ———, 88 S. Ct. 1444, ——— L. Ed. 2d ———, which defined a misdemeanor punishable by 2 years imprisonment as a serious crime requiring a jury trial.

It is true we have previously said that a finding of delinquency is not punishment for a crime. However, the United States Supreme Court has questioned this legalistic fiction where constitutional rights are directly presented. It is the substance and not the form which will control.

Petitioner, who was 17 years of age, was charged with being a juvenile delinquent because of an alleged violation of the criminal law. He was found delinquent and was committed to the Boys' Training School at Kearney, where he may be confined until he becomes 21, and from which before that time he may be transferred to the Nebraska Penal and Correctional Complex. Our law authorizes the court to commit a delinquent child to the custody of the Department of Public Institutions. S. 43-210, R. S. Supp., 1967. If he had been a few months older, or 18 rather than 17, he could not have been charged as a juvenile, and without question would have been entitled to all constitutional safeguards.

I concede that In re Gault, *supra*, did not specifically pass upon the right to a trial by jury in a juvenile case, but do suggest it does conclude that the doctrine of parens patriae, which for years has been invoked to justify fewer constitutional safeguards for children, must be discarded.

The following quotations from In re Gault, *supra*, indicate that the conclusion supported by a majority of the court is the only one possible under the circumstances:

"Mr. Justice Douglas said: 'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.' To the same effect is Gallegos v. Colorado, 370 U. S. 49 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the

Fourteenth Amendment nor the Bill of Rights is for adults alone. * * *

"* * * the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. * * *

"The juvenile offender is now classed as a 'delinquent.' * * *. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. * * *

"It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional laws. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. * * *

"* * *. juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even an assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions after having been found 'delinquent' by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' "

With a background of several years' experience in juvenile matters, I can appreciate the position of the many conscientious experts on juvenile problems who be-

lieve that it is to the best interests of the child that a public trial, with all its connotes, be avoided, and that the case of the juvenile be processed as informally as possible. Yet, I am persuaded that it is my duty to keep ever in mind that a child, as well as an adult, is entitled to all constitutional protections and that his rights cannot be determined by the criterion of what I may feel is best for him. The decision on the question of a waiver of his constitutional rights is a decision that must be made for him by his legal representative.

SUPREME COURT OF THE UNITED STATES

No. 662, October Term, 1968

CLARENCE DEBACKER, APPELLANT

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska

APPEAL from the Supreme Court of the State of Nebraska

ORDER NOTING PROBABLE JURISDICTION

February 24, 1969

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

SUPREME COURT OF THE UNITED STATES

No. 662, October Term, 1968

CLARENCE DEBACKER, APPELLANT

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

March 24, 1969

UPON CONSIDERATION of the motion of the appellant for leave to proceed further herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT, U. S.

OCT 17 1968

JOHN F. DAVIS, CLERK

No. [redacted] 15

IN THE

Supreme Court of the United States

October Term [redacted] 1968

CLARENCE DeBACKER,

Appellant,

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

WILLIAM G. LINE and
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GANT PUBLISHING CO., Lincoln, Nebraska

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IN THE

Supreme Court of the United States

October Term 1968

No. --------

CLARENCE DeBACKER,

Appellant,

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Nebraska, appearing in the appendix hereto, is reported at 183 Neb. 461, —— N. W. 2d ——.

JURISDICTION

I.

This is a habeas corpus action brought pursuant to Section 29-2801, R. S. Neb. 1943, challenging the validity of

Section 43-206.03, R. S. Supp., 1967, under the Sixth and Fourteenth Amendments to the Constitution of the United States.

II.

The judgment of the Supreme Court of Nebraska was entered on October 4, 1968 and the notice of appeal was filed in the Supreme Court of Nebraska on October 7, 1968.

III.

The jurisdiction of this Court rests on 28 U. S. C. § 1257 (2).

IV.

A case believed to sustain the jurisdiction of this Court is *Application of Gault*, 387 U. S. 1, wherein an appeal was had from a judgment of the Supreme Court of Arizona affirming the dismissal of a petition for a writ of habeas corpus challenging, under the Federal Constitution, Arizona's juvenile code.

THE STATUTE INVOLVED

This appeal challenges the validity of Section 43-206.03 of the Statutes of Nebraska which appears in the 1967 Cumulative Supplement thereto at page 1252 and which is set forth verbatim as follows:

> "JUVENILE COURT; HEARINGS; ADJUDICATION; EFFECT. (1) The hearing as to a child in custody of the probation officer or the court shall be held as soon as possible after the petition is filed, and as to a child not in such custody as soon as practicable after the petition is filed.
>
> "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the cus-

tomary rules of evidence in use in civil trials without a jury in the district courts.

"(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its findings and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child.

"(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment.

Sources: Laws 1963, c. 252, § 4, p. 770. Elective date June 15, 1963."

QUESTIONS PRESENTED

I.

Whether provision of Nebraska Juvenile Court Act denying juvenile trial by jury in juvenile court for offense which would be triable by a jury if committed by an adult violates juvenile's Sixth Amendment rights in light of this Court's decisions in *Application of Gault*, 387 U. S. 1;

Duncan v. Louisiana, 391 U. S. 145; and *Bloom v. Illinois*, 391 U. S. 194.

II.

Whether, in light of *Gault*, statute providing for proof by preponderance in delinquency proceeding, based on misconduct which would be felony if charged criminally, is invalid under Fourteenth Amendment.

III.

Whether juvenile is denied due process under Fourteenth Amendment when Nebraska Juvenile Court Act, as construed by the Nebraska Supreme Court, invests prosecutor with an unreviewable discretion as to whether he will proceed against juvenile in juvenile court or under the criminal code thereby giving prosecutor sole power to determine whether juvenile shall have right to jury trial and whether prosecution's burden of proof is by preponderance or beyond a reasonable doubt.

STATEMENT OF THE CASE

A petition (R.10) was filed in the County Court of Dodge County, Nebraska, sitting as a juvenile court, charging appellant with being a delinquent child within the meaning of Section 43-201 (4), R. S. Supp. 1967, on the basis of his having had in his possession a forged check with the intent to utter it as genuine in violation of Section 28-601 (2), R. S. Neb. 1943. Appellant raised his Sixth Amendment right to trial by a jury in the County Court by objecting to the jurisdiction of the court, at the commencement of the proceedings, because of the statutory denial of a jury trial (R.39). The juvenile court overruled (R.59) the jurisdictional objection and proceeded to adjudicate appellant a delinquent child on the basis of the following facts.

Appellant gave a check bearing the signature of his father, Donald J. DeBacker, to a grocery store in exchange for groceries. He told the clerk, who knew his father and mother and who had taken checks from his father previously, that his father's signature was on the check. Appellant gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for him and needed more food. He said his mother was very jittery and told him to sign his father's name to a check blank which she had given him. His mother assured him that it was alright for him to go ahead and write the check so he did so signing his father's name. Appellant's mother went to the grocery store with him and he received groceries and approximately $10.00 change for the check which was in the amount of $30.00. It was stipulated in the juvenile court that appellant's father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check and that he told the police perhaps his wife and appellant may have had something to do with the check (R.42-54).

Upon the adjudication of delinquency, appellant was committed to the custody of the Department of Public Institutions under the provisions of Section 43-210 (2), R. S. Supp. 1967, with directions to place him in the Boys Training School at Kearney (R.61). Pursuant to Section 43-210.02, R. S. Supp. 1967, such commitment might extend to his 21st birthday.

While appellant was in the custody of the Dodge County Sheriff awaiting transfer to the industrial school under the order of commitment, he filed a petition for a writ of habeas corpus (R.3) seeking his discharge for the reason

that Section 43-206.03, R. S. Supp. 1967, was invalid under the Fourteenth Amendment in requiring a juvenile court to make a finding of delinquency based on a violation of state law on a preponderance of the evidence rather than by proof beyond a reasonable doubt and for the further reason that the statute was invalid under the Sixth Amendment because of its prohibition of a jury trial. Appellant also alleged that he was denied due process when his right to a jury trial and the protective procedures of the criminal code were left to depend on the uncontrolled discretion of the prosecutor as to whether he would proceed in juvenile court or under the criminal code in District Court.

The District Court, after a hearing in which a transcript of the proceedings in juvenile court was introduced in evidence, dismissed appellant's petition (R.15). He appealed to the Supreme Court of Nebraska assigning as error that the District Court erred in not finding Section 43-206.03, R. S. Supp. 1967, invalid under the Sixth and Fourteenth Amendments to the Constitution of the United States (R.71).

The Nebraska Supreme Court in a three to four decision (Art. V, Sec. 2 of the Constitution of Nebraska provides that no legislative act shall be held unconstitutional except by the concurrence of five judges) affirmed the decision of the District Court (R.68). A majority of four judges were of the opinion that this Court's decisions in *Application of Gault,* 387 U. S. 1, and *Duncan v. Louisiana,* 391 U. S. 145, required a holding that the challenged section of the Nebraska Juvenile Court Act violated the Sixth and Fourteenth Amendments (R.71). A minority of three judges were of the opinion that juvenile court proceedings are still civil in nature; that the parens patriae doctrine is still viable and that the statute should not be invalidated unless

this Court should specifically rule that juvenile proceedings leading to the commitment of a juvenile to an institution are sufficiently criminal to require the application of the Sixth Amendment right to trial by jury and the due process requirement of proof beyond a reasonable doubt (R.83).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The question of whether juveniles may be deprived of trial by jury and a standard of proof beyond a reasonable doubt by labeling delinquency proceedings civil rather than criminal has not been explicitly decided by this court. The questions were sufficiently substantial to warrant the grant of certiorari in *In re Whittington*, 391 U. S. 341, but the questions were left undecided because this Court felt the Ohio court did not have the opportunity to assess the impact of *Gault* and because there was no final disposition beyond the adjudication itself, a situation not present here where appellant is challenging a final order of commitment to a state institution. Furthermore, *Duncan v. Louisiana*, 391 U. S. 145, applying the Sixth Amendment's guarantee of trial by jury to the states and *Bloom v. Illinois*, 391 U. S. 194, holding that a two year sentence for criminal contempt could not be imposed without making available the right of trial by jury, surely make appropriate a determination by this Court as to whether these fundamental rights now available to adults throughout this nation should not likewise be available to juveniles facing possible commitment for years to a state institution.

In this case the Nebraska Supreme Court did have the opportunity to assess the impact of *Gault* and the sharp division of the Nebraska court resulting in three separate opinions with a majority of four judges in favor of striking down the offending portion of the Nebraska Juvenile

Court Act, indicates the need for this Court to make a final determination of these questions for the Nation.

Respectfully submitted,

WILLIAM G. LINE and
JOHN F. KERRIGAN

110 East 5th Street
Fremont, Nebraska

APPENDIX

CLARENCE J. DEBACKER, APPELLANT, v. HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, APPELLEE.

— N. W. 2d —

Filed October 4, 1968. No. 36989.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Kerrigan, Line & Martin, for appellant.

Richard L. Kuhlman, for appellee.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for amicus curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

PER CURIAM.

The petitioner was found to be a delinquent child and ordered committed to the Boys' Training School at Kearney. The facts alleged as the basis for the charge of delinquency constituted the crime of forgery if he had been charged under the general criminal laws. Petitioner asserts that section 43-206.03, R. S. Supp., 1967, a part of the Juvenile Court Act, is unconstitutional in that it denies him the right of a jury trial, and applies a "preponderance of the evidence" rule rather than a "beyond a reasonable doubt" rule to the adjudication of delinquency.

Four judges are of the opinon that the statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional. Article V, Section 2, Constitution of Nebraska, provides in part: "No legislative act shall be held unconstitutional except by the concurrence of five judges."

The petition for habeas corpus here was dismissed by the district court. That judgment, must, therefore, be affirmed.

AFFIRMED.

McCOWN, J., joined by SPENCER, BOSLAUGH, and SMITH, JJ.

The constitutional rights of juveniles and the developing ramifications of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (May 15, 1967), are at issue here. By habeas corpus, the petitioner, a 17-year-old minor, sought his discharge from the custody of the Dodge County sheriff under an order committing him to the Boys' Training School at Kearney. The denial of a jury trial and the statutory application of a preponderance of the evidence rule rather than the beyond a reasonable doubt rule are the basis of the constitutional challenge.

The county attorney filed a petition in the Dodge County court within its juvenile jurisdiction charging that Clarence J. DeBacker, a minor 17 years of age, was a delinquent child within the meaning of section 43-201(4), R. S. Supp., 1967. The basis for the charge of delinquency was the possession of a forged check with intent to utter it as genuine. The facts alleged in the petition constituted the crime of forgery under section 28-601(2), R. R. S. 1943, if he had been charged under the general criminal laws. The penalty for violation of that section is imprisonment in the Nebraska Penal and Correctional Complex not exceeding 20 years nor less than 1 year and a fine not exceeding $500.

The check bore the signature "Donald J. DeBacker," petitioner's father, and was given to the O. P. Skaggs store for groceries on January 26, 1968. The check was

passed by the petitioner who said his father's signature was on the check. Petitioner's father and mother were known to the clerk at the store who had taken checks from petitioner's father previously. Petitioner, after full and complete Miranda warnings, gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for the petitioner and needed more food. His mother was very jittery and told petitioner to sign his father's name to a check blank which she had given him. Petitioner's mother assured him that it was all right for him to go ahead and write the check so he did so, signing his father's name. Petitioner and his mother went to the store and petitioner went in and got groceries and approximately $10 change. It was stipulated that petitioner's father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check; and that he told the police perhaps his wife and petitioner may have had something to do with the check.

Before the proceedings commenced, petitioner objected to the jurisdiction of the court because of the denial of his right to a jury trial. At the conclusion of the evidence, the county judge, as judge of the juvenile court, overruled the objection to the jurisdiction of the court, and found that petitioner was a delinquent child. Thereafter, the court ordered the petitioner committed immediately to the Boys' Training School at Kearney. Habeas corpus relief was denied by the district court, and this appeal followed.

Some background is necessary to provide a frame of reference for the constitutional issues raised here. Until the turn of the century, juveniles in the United States were generally treated as adults insofar as the criminal law was concerned, and, of course, had the same constitutional rights as adults. With the advent of juvenile court acts, which began in Illinois in 1899, the system of juvenile courts spread to every state in the union. The theory was that for their misconduct, children should

not be handled, treated, or punished in the same fashion, nor under the same processes and procedures, as adult criminals. The theory also was that a child should not be determined to be guilty or innocent of criminal conduct and there should be a broad range of rehabilitation procedures. In brief, the juvenile court procedures were regarded as being beneficial to the child, and intended to remove and discard the technicalities of substantive and procedural law for adults. Over 40 states have upheld the constitutionality of juvenile court laws erected on such concepts. Nebraska was one. See State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804 (1913). In that case, our court took the same approach as other states, and based the validity of the Juvenile Court Act on the doctrine of parens patriae. The state, through the juvenile court, was merely performing the duty of seeing that the child was properly cared for. The problems involved in denying to a juvenile the constitutional protections afforded to an adult charged with crime were avoided simply by declaring that the juvenile court procedure was civil rather than criminal in nature. This court said in State ex rel. Miller v. Bryant, *supra*: "The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help."

Some of the juvenile court acts made the jurisdiction of the juvenile court exclusive, and some provided for a waiver by the juvenile court to the adult criminal court. The Nebraska pattern created a concurrent jurisdiction as to criminal misconduct, and enabled the county attorney to determine whether to file an action under the general criminal laws of the state, or a delinquency proceeding in the juvenile court. See, State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101; Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240.

At its inception in 1905, and until 1963, the Nebraska Juvenile Court Act, with respect to jury trials in juvenile court, provided: "In all trials under this act where a delinquent child is charged with a crime, any person

interested therein may demand a jury or the judge of (on) his own motion may order a jury to try the case; ** *." See Laws 1905, c. 59, § 2, p. 306, now § 43-402, R. R. S. 1943.

This specific provision for a jury trial was effectively eliminated by this court. We held that charging a child with being delinquent did not charge him with a crime, even though the facts alleged would have constituted a specific charge of crime if made against an adult. Such charges, we said, merely set forth the necessary facts showing him to be delinquent. See Laurie v. State, 108 Neb. 239, 188 N. W. 110.

This position was reaffirmed on many occasions. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72 (1963). It should be noted that in the Hans case, Chief Justice Simmons specifically dissented from that part of the court's opinion that approved the denial of a jury trial. He satted in that dissent: "By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide."

In 1963, in an extensive recodification of the Juvenile Court Act, the provision for jury trials was removed. Section 43-206.03, R. S. Supp., 1967, now provides in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts.

"(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence,

whether or not the minor is a person described by section 43-201.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child."

Section 43-201, R. S. Supp., 1967, now establishes four different subdivisions: Dependent child, neglected child, delinquent child, and a child in need of special supervision.

This pattern was only typical of what happened in all the states. Form swallowed substance, and semantics disposed of the constitutional rights of juveniles charged with being "delinquent." The basic assumption that an adjudication of "delinquency" was in no sense criminal but only civil was reflected by both courts and legislatures. The result was that a child charged in juvenile court with misconduct which would have been criminal if he had been an adult became, in effect, a constitutional nonperson. And then came Gault!

In In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, it was stated: "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."

The Gault case, which applied the due process standard to juvenile proceedings involving the adjudication

of delinquency, was foreshadowed in Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). That case held that the hearing in juvenile court to waive the "exclusive" jurisdiction of the juvenile court to the adult criminal court under a District of Columbia statute must measure up to the essentials of due process and fair treatment.

In re Gault has spawned an almost unending volume of comment. The holding in Gault refers only to the adjudicatory stage of the juvenile court process—the adjudication of delinquency where commitment to a state institution may follow and when the proceedings may result in incarceration in an institution of confinement. It does not require that juveniles be handled as adults, nor does it affect the dispositional process after an adjudication of delinquency. It clearly does not apply to procedures involving neglected or dependent children, nor to any proceeding except those by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to the area of adjudication of delinquency circumscribed by Gault, it does require that the process must meet the standards of due process. We believe that an implicit foundation for the holding in Gault is the conclusion that juvenile proceedings to declare a juvenile "delinquent" as a result of his own misconduct are at least sufficiently criminal in nature that the constitutional rights involving due process in criminal cases must be applied. The due process requirements spelled out in Gault do not pass upon the issue of whether or not the right to a jury trial is a fundamental part of that due process. The problem here is whether the right to a jury trial is an essential part of due process in the area of adjudication of delinquency outlined by Gault.

So far as present research indicates, since the Gault decision, three states have passed upon the issue of whether a juvenile has a constitutional right to a jury trial in juvenile court at the adjudicatory stage of the

juvenile court process of determining delinquency. Two of these cases have denied such right and one has upheld it on the basis of a statutory interpretation.

Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (Sept. 15, 1967), held that denial of a jury trial to a juvenile on charges of rape, assault with intent to ravish, assault and battery, and indecent assault was not violative of the juvenile's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The court relied heavily on the fact that the United States Supreme Court had never held that the right to trial by jury was a fundamental part of due process imposed upon the states through the Fourteenth Amendment. The court also conceded that the change of the name of the offense from "rape" to "delinquency" did not of itself affect the constitutional right of the accused to a trial by jury.

Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (March 5, 1968), held that jury trial in a juvenile delinquency proceeding was not a constitutional requisite. The Washington court relied upon the Johnson case and also concluded that Gault should not be considered as a mandate incorporating the right to a jury trial within the fundamental essentials of due process, and also reaffirmed its previous conclusion that the Washington constitutional requirements as to trial by jury were applicable only to criminal prosecutions, and that juvenile court proceedings should not be considered criminal.

Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (Feb. 26, 1968), held that under the New Mexico juvenile court statute, a juvenile charged with violation of a state law is entitled to a trial by jury in juvenile court if there is no certification to district court and if the offense is one which would be triable by a jury if committed by an adult.

All of these cases were decided prior to Duncan v. Louisiana, —— U. S. ——, 88 S. Ct. 1444, —— L. Ed. 2d ——, decided May 20, 1968.

In Duncan, for the first time, the Supreme Court held that the right to jury trial in serious criminal cases is a fundamental right, and hence must be recognized by the states as a part of their obligation to extend due process of law to all persons within their jurisdiction. While Duncan avoids any clear-cut holding as to what will constitute a serious criminal case, it does indicate quite obviously that the dividing line may depend upon the maximum possible time of imprisonment provided as a penalty. It also indicates that the present federal rule of 6 months may be the appropriate measure.

In re Whittington was disposed of on the same date on which Duncan was decided. Whittington involved the issues of the right to trial by jury and standards of proof in adjudications of juvenile delinquency. Because of an intervening order binding the juvenile over for trial as an adult, the Supreme Court did not pass on the issues. It did, however, vacate the judgment and remand the cause to the Ohio court for consideration in light of Gault. See In re Whittington, —— U. S. ——, 88 S. Ct. 1507, —— L. Ed. 2d —— (May 20, 1968).

If Gault is ultimately interpreted as meaning that any juvenile court proceeding to determine "delinquency" is a "serious" case because the child might be subjected to the loss of his liberty for more than 6 months, then every adjudication of juvenile delinquency would give rise to a constitutional right to a jury trial. Some language in Gault might be so interpreted. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." In re Gault, *supra*, p. 36.

However, Gault did not impose the requirement of a jury trial as a part of due process in adjudications of delinquency. This omission might rest on two obvious facts. Duncan had not yet been decided, and, in Gault, the crime involved, if committed by an adult, could have resulted only in a fine of $5 to $50 or a jail sentence of not more than two months. It was, therefore, not a

"serious" criminal case, and an adult would not have been entitled to a constitutional right to trial by jury, even under Duncan. Therefore, Gault could also be interpreted as meaning that even though adjudications of delinquency are at least partially criminal in nature, a juvenile is only entitled to the same constitutional right to jury trial as an adult would be for the same actions in an adult criminal court.

The length of possible punishment may be an "objective" basis for dividing serious and petty crimes in the general criminal courts. There individual crimes are set out in dozens of variations and the punishments are applied to the specific acts constituting the individual crime. Under the Nebraska Juvenile Court Act, a "delinquent" is now defined as: "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." § 43-201, R. S. Supp., 1967. The complete range of disposition permitted by the Juvenile Court Act may be applied to the single category of "delinquent." A correlation between juvenile court and adult criminal court as to the constitutional right of trial by jury, based solely on possible length of "punishment," presents difficult alternatives. Faced with such alternatives, we see no present justifiable reason to declare that all proceedings to determine that a child is delinquent under the Juvenile Court Act are "serious criminal cases" giving rise to a constitutional right to trial by jury under the due process clause.

Four judges, a majority of this court, are of the opinion that a juvenile charged with violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a constitutional right to a trial by jury in juvenile court if the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court. To the extent the provisions of section 43-206.03, R. S. Supp., 1967, are in conflict, we believe they are unconstitutional. This conclusion is also reinforced by the case of Nieves v. United States, 280 F. Supp. 994, decided March 5, 1968. This constitutional right, of course, may

be waived, although special problems may arise with respect to waiver. See In re Gault, *supra.*

Four judges are also of the opinion that a finding of delinquency, for misconduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. See In re Urbasek, 38 Ill. 2d 535, 232 N. E. 2d 716; United States v. Costanzo, 395 F. 2d 441 (4th Cir.). To the extent that those provisions of the Juvenile Court Act, section 43-206.03, R. S. Supp., 1967, incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void.

CARTER, J., joined by WHITE, C. J., and NEWTON, J.

This is an appeal from the denial of a writ of habeas corpus. The petitioner is a 17-year-old boy who sought a release from the custody of the county sheriff under an order committing him to the Boys' Training School at Kearney, Nebraska, as a juvenile delinquent. It is the contention of the petitioner that upon demand, which was made, he is entitled to a trial by jury and to have the issue of his delinquency determined under the rule in criminal cases requiring a finding of guilt beyond a reasonable doubt.

The first Juvenile Court Act was enacted in this state in 1905. The history of the act is set out in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101. Prior to 1963, the act and the amendments thereto did not provide for a trial by jury except where a delinquent minor child is charged with a crime. In 1963, the act was amended to provide in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts." § 43-206.03, R. S. Supp., 1967.

In a delinquency case such as the one before us in which a jury was demanded and denied, this court said:

"The act itself makes no provision for a trial by jury except where a delinquent child is charged with a crime. The complaint was intended to charge, and did charge, the boy with being a dependent, neglected and delinquent child. Dependent and neglected in this; that said Alton Laurie * * * has violated the laws of the state; * * * and was repeatedly guilty of operating a motor car in violation of law. It is evident the specific charges in the complaint of law violation were not made with the intention of charging him with crime, but to set forth and state the facts showing him to be a dependent, neglected and delinquent child. The statute defines dependent, neglected and delinquent children, and to bring the case within the statutory provision, it was necessary to make these allegations, and without such, or similar allegations, the petition would be subject to attack. It is not enough that the petition charge that the boy was a dependent, neglected and delinquent child, but it must go farther and set forth facts showing that he was such a child, and until such a petition was filed he would be uninformed of what he would have to meet. The petition in such cases must inform the defendant of the charge he is to meet, to enable him to prepare for his trial. And an examination of the petition brings us to the irresistible conclusion that the charge against the boy was that of delinquency. A commitment to the industrial school upon such a charge is not a conviction of a crime, or a commitment to a penal institution." Laurie v. State, 108 Neb. 239, 188 N. W. 110. In the foregoing case, Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422, is quoted with approval in part as follows: " 'The proceeding is not one according to the course of the common law in which the right of trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental author-

ity. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered.' " See, also, Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267. The foregoing holdings of this court have remained the law of this state to the present time.

The original pleading filed in the delinquency proceeding is labeled a petition and alleges that the petitioner in the present case is a delinquent child within section 43-201(4), R. S. Supp., 1967, in that he was in the possession of a forged, false, and counterfeited bank check. I point out that petitioner was not charged with a crime, he was not and could not be tried on a criminal charge, no punishment for a crime was or could be inflicted, and the presumption of innocence as to the commission of crime is still applicable to him. It is argued here that a finding of delinquency is in practicable effect a conviction for crime in that some persons have so construed it in transactions in the market place. But there is no evidence that any court has placed any such controlling construction upon it. It cannot be logically argued that because some persons may incorrectly choose to treat the proceeding as criminal in nature it then has

the effect of making it so and thus affords a basis of unconstitutionality.

The position of the members of the court who would reverse and remand place the Juvenile Court Act in an unconscionable situation even if amended to conform to thier views. A delinquent child may be committed to the training school whether or not the evidence points toward the commission of a crime by the juvenile. In either event, the juvenile may be committed until his conduct has been adequately corrected or until he has been placed in a suitable environment, but in no event beyond the age of 21 years. In other words, the corrective process is the same whether or not the supporting evidence indicates that the commission of crime may be involved. In requiring a jury trial when demanded, if there is evidence that some criminal act may be involved, the real purpose of the Juvenile Court Act is destroyed. It tosses the juvenile into a trial by jury where he is tried for all intents and purposes as a criminal when this is one of the things the Juvenile Court Act purports to eliminate. Instead of a hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, broadcasts to the world the evidence of a crime with which he has never been charged, and reinstates the evils of trying young juveniles on the same basis as adult criminals.

The purpose of juvenile courts must be reiterated here to gain a proper conception of the problem before us. The past several decades have produced a complete change in attitude of the state toward its offending children. The problem of the delinquent child is, in its social significance, of great importance for on its wise solution depends the future of our youth as responsible citizens. The present thinking is that the juvenile who has begun to go wrong, who is incorrigible, who has violated some law or ordinance, is to be taken in hand by the state through a juvenile court, under the doctrine

of parens patriae, as a guardian because of the unwillingness or inability of his natural parents to guide him toward responsible citizenship. Legislation establishing juvenile courts and providing methods to deal with dependent, neglected, and delinquent children shows a modern solicitude of the law for the best interests of such children. The juvenile court is not a criminal court; it does not punish for crime. Its purpose is corrective and reformative, and its ultimate purpose by its procedures is to permit the juvenile judge to best guide and control juvenile wrongdoers, with more consideration for the future development than for their past shortcomings. The creation of such courts has been characterized as the most outstanding development in the administration of criminal justice since the signing of the Magna Carta. 31 Am. Jur., Juvenile Courts, Etc., §§ 2 and 5, pp. 296, 297.

It is contended by the petitioner that a contrary view is required by the case of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, and the asserted judicial history of that case. It is in the consideration of this issue where I must part company with the petitioner's contention.

No fault can be found with the granting of the writ of habeas corpus for failure to comply with conventional due process, i.e., the insufficiency of the petition in charging delinquency, the failure to give notice and hearing, and matters of that nature. The issue here is whether or not juvenile acts which have been held constitutional in some 40 states in fact violate constitutional due process under the Fourteenth Amendment to the Constitution of the United States. I concede that the provisions of state juvenile acts must be complied with in accordance with their terms. The issue here does not involve any alleged failures in this respect. It may be true, and it probably is, that errors have been made by juvenile courts, but this is a condemnation of personnel and not the procedures that would justify a holding of unconstitutionality. If error in administration is a basis of a holding of unconstitutionality there would be few stat-

utes which would escape. But the right of review for the correction of errors exists in this state and adequately protects against the ruthless administration of the act which the Gault opinion asserts as existing. The Gault opinion attacks the statutory efforts to conceal the deviational behavior of wayward juveniles as being "more rhetoric than reality." It questions the trial before a juvenile judge in affording due process by stating that "the condition of being a boy does not justify a kangaroo court," an implied criticism of juvenile judges that is wholly unwarranted. In the Gault case, the petitioner was a 15-year-old boy. The opinion indicates that the primary ground in finding him to be delinquent was the use of vile and lewd statements over a telephone, a misdemeanor for which, if convicted, would carry a penalty of $5 to $50 fine or a jail sentence for not more than 2 months. It is then asserted that under the juvenile act he was committed to custody for a maximum of 6 years. The comparison is simply not true, unless he fails to accept correction and continues as an incorrigible juvenile. The opinion plainly states that the rights of an adult under a criminal charge exceed those of a juvenile delinquent, but here the juvenile was not charged with crime. It is completely overlooked, however, that the juvenile received many advantages because of his youth that the criminal juvenile or adult does not possess, which is the very purpose of the Juveile Court Act. In fact, the requirement of a jury trial defeats the very purpose of the act.

But irrespective of the foregoing, the Gault case does not hold or even infer that a jury trial is essential to due process in a delinquency case, even where the supporting evidence points to criminal conduct on the part of the juvenile. The most that is said by Gault with reference to a jury trial being essential to due process in a delinquency case is the following: "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to

adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury." This latter statement is supported by Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84, wherein it is said: "Because the State is supposed to proceed in respect of the child as parens patriae and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions * * * that he is not entitled to counsel. * * * This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, *and we go no further.*" (Italics supplied.)

There is no holding by the Supreme Court of the United States that due process requires a jury trial in a delinquency proceeding under a juvenile court act. Three state Supreme Courts have passed on the issue since Gault and Kent. Some reference is made to Duncan v. Louisiana, —— U. S. ——, 88 S. Ct. 1444, —— L. Ed. 2d ——, but this case is a criminal appeal in which the question of delinquency under a juvenile court act is not involved. In Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (1968), the court held that a jury trial was re-

quired under the provisions of the state statutes, and is therefore not pertinent here.

In Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (1967), in dealing with the very question, that court said: "In summary, we are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through Gault, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children. Accordingly, we reject appellant's request for a jury trial."

In Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (1968), the court, in declining to construe Gault as requiring a jury trial in a dependency case, said: "While recognizing that in the instant case the above-mentioned requirements were met, and further that Gault did not specifically determine that jury trials are required in juvenile proceedings, petitioner nevertheless argues that, under the reasoning of Gault, a juvenile accused of an act which could lead to his institutionalization is entitled to the same procedural and constitutional rights as an adult accused of a crime, which rights would include a jury trial. * * * We do not believe that the Supreme Court's opinion in Gault, supra, is to be considered as a

mandate to abandon this beneficical concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury."

Summarizing my position, the Supreme Court of the United States has never held that a jury trial is essential to due process in a delinquency proceeding under a juvenile court act. Two state Supreme Courts have held that a jury trial is not required in such cases and that Gault and Kent do not hold otherwise. Since 1905, when our first Juvenile Court Act was enacted, this court has consistently held to the constitutional validity of our Juvenile Court Act including the provisions for a non-jury trial. There is no case authority holding that a jury trial is a requirement of due process in a delinquency proceeding.

The purport of the petitioner's position is that a jury trial is required by the holdings of the Supreme Court of the United States. But that court has not so held. To hold that it has, under such circumstances, has the effect of overruling the previous holdings of this court without making reference to them and without regard to the fact that the two state Supreme Courts passing on the issue since Gault have determined that the Gault case does not hold that a jury trial is required in a delinquency case under the due process clause of the Fourteenth Amendment to the federal Constitution. An opinon to the contrary could be supported only by its own rhetoric. Such a holding can be based only on the assumption that the United States Supreme Court will eventually hold that a jury trial in juvenile delinquency cases is required to afford due process. To this I do not subscribe since that court, with opportunities to do so before it, has declined to so hold. Guessing with what that court may or may not do affords no basis under the rule of federal judicial supremacy to hold an otherwise

valid act invalid by no less authority than peering into a crystal ball. By this process, the Juvenile Court Act, a legislative act which has been characterized as the most outstanding improvement in the administering of the affairs of delinquent juveniles in the last century, is held, in effect, to be unconstitutional.

It is the fuction of this court to protect its own jurisdiction against encroachment. It is my firm opinion that this court ought not to yield up its own powers to the Supreme Court of the United States until such court has made a final and binding judgment that can be imposed on this court under the doctrine of judicial supremacy. If and when such a judgment is entered by the Supreme Court of the United States, this court ought and will alter its position to comply therewith however much it may disagree with its soundness. But in the absence of a holding of unconstitutionality under the federal Constitution, this court is not bound by the rule of judicial supremacy, nor should it be voluntarily accepted in view of our own statute and the mass of authorities in this and other states upholding its constitutional validity.

I am not so naive as not to recognize that Kent, Gault, and Duncan point to the eventual destruction of the juvenile court acts existing in most of the states of the union. This conclusion is based on statements in those opinions to the effect that a finding of delinquency is in practicable effect a conviction for crime; the attempt to forego criminal prosecution in favor of a civil corrective process is said to be "more rhetoric than reality"; it is asserted that due process is not provided by stating that "the condition of being a boy does not justify a kangaroo court"; and that juveniles are denied rights in criminal cases that are afforded to adults. I submit that a close examination of the situation reveals that these assertions simply are not true. The Supreme Court of the United States appears to be pointing toward a declaration of the unconstitutionality of the beneficent provisions of most juvenile court statutes. It appears willing to ignore the consistent holdings of constitutionality by state and federal courts over the past few

decades and thereby rejects all the logic and reasoning supporting these holdings. It appears to take the position that its wisdom in this area exceeds in quality all the judicial pronouncements before it in the field of juvenile delinquency. The fact that a judge is a member of the highest court of the nation or state is not, of itself, proof of infallibility of decision. It might be well for members of such courts, on occasion, to step down from their ivory towers and recall with some humility that they were at the time of their appointment better than average lawyers with little judicial experience, of which there are many, who know a President or Governor. In drafting the Constitution of the United States, our forefathers did not provide the states with a practical means of combating misconstruction of the Constitution or the encroachment of federal authority upon the sovereign power of the states. As I have before stated, it is the duty of this court to defend its own jurisdiction. The power of the pen is the only remedy left us. When and if a decision of the Supreme Court of the United States holds the Juvenile Court Act of this state to be unconstitutional under the federal Constitution, I want to make it clear that I shall recognize the power of that court to do so under the doctrine of judicial supremacy, but with the reservation of the privilege to protest its right to do so. But I shall neither bend the knee nor bow the head on mere inferences, speculations, or probabilities as to what that court will eventually do. Clear and plain holdings of unconstitutionality alone require us to apply the doctrine of judicial supremacy to the holdings of the Supreme Court of the United States. Having these views that I deem applicable to the case at bar, I concur in the affirmance of the judgment of the trial court.

SPENCER, J., joined by SMITH, J.

I am impelled to suggest that Judge Carter's opinion too casually brushes aside the impact of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, particularly when read in conjunction with Duncan v. Louisiana, —— U. S. ——, 88 S. Ct. 1444, —— L. Ed. 2d ——,

which defined a misdemeanor punishable by 2 years imprisonment as a serious crime requiring a jury trial.

It is true we have previously said that a finding of delinquency is not punishment for a crime. However, the United States Supreme Court has questioned this legalistic fiction where constitutional rights are directly presented. It is the substance and not the form which will control.

Petitioner, who was 17 years of age, was charged with being a juvenile delinquent because of an alleged violation of the criminal law. He was found delinquent and was committed to the Boys' Training School at Kearney, where he may be confined until he becomes 21, and from which before that time he may be transferred to the Nebraska Penal and Correctional Complex. Our law authorizes the court to commit a delinquent child to the custody of the Department of Public Institutions. § 43-210, R. S. Supp., 1967. If he had been a few months older, or 18 rather than 17, he could not have been charged as a juvenile, and without question would have been entitled to all constitutional safeguards.

I concede that In re Gault, *supra*, did not specifically pass upon the right to a trial by jury in a juvenile case, but do suggest it does conclude that the doctrine of parens patriae, which for years has been invoked to justify fewer constitutional safeguards for children, must be discarded.

The following quotations from In re Gault, *supra*, indicate that the conclusion supported by a majority of the court is the only one possible under the circumstances:

"Mr. Justice Douglas said, 'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.' To the same effect is Gallegos v. Colorado, 370 U. S. 49 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact,

neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. * * *

"* * * the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is —to say the least—debatable. * * *

"The juvenile offender is now classed as a 'delinquent.' * * * It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. * * *

"It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional laws * * *.' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. * * *

"* * * juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions after having been found 'delinquent' by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'"

With a background of several years' experience in juvenile matters, I can appreciate the position of the many conscientious experts on juvenile problems who believe that it is to the best interests of the child that a public trial, with all it connotes, be avoided, and that the case of the juvenile be processed as informally as possible. Yet, I am persuaded that it is my duty to keep ever in mind that a child, as well as an adult, is entitled to all constitutional protections and that his rights cannot be determined by the criterion of what I may feel is best for him. The decision on the question of a waiver of his constitutional rights is a decision that must be made for him by his legal representative.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 15

CLARENCE J. DeBACKER, APPELLANT,

V.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 662

CLARENCE J. DeBACKER, APPELLANT,

V.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, APPELLEE.

MOTION TO DISMISS

Appellee respectfully moves the Court to dismiss this appeal from the Supreme Court of the State of Nebraska for the reason that it does not present a substantial federal question.

HOMER BRAINARD, Sheriff of
Dodge County, Nebraska
APPELLEE.

By RICHARD L. KUHLMAN
County Attorney of
Dodge County, Nebraska,
Fremont, Nebraska 68025
and
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Assistant Attorney General
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Room 2119 State Capitol
Lincoln, Nebraska 68509
Attorneys for Appellee

BRIEF IN SUPPORT OF MOTION TO DISMISS

The juvenile system of jurisprudence is set up as a civil court, with the State in its role of *parens patriae*, attempting to work out a solution to the problems of a child, strictly through rehabilitation. The role of the State in criminal matters also has, retribution, punishment, and deterrence as purposes in meting out sentences.

This Court, in *Re Gault*, 387 U. S. 1, quoted the following from *Kent* v. *United States*, 383 U. S. 541, with approval:

> "* * * * *
>
> "* * * 'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a *criminal trial or even of the usual administrative hearing;* but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' * * *
>
> "* * * * *" (Emphasis supplied.)

This Court in the *Gault* case, after quoting the above from the *Kent* case, had this to say in regard thereto at 387 U.S. 30:

> "* * * * *
>
> "* * * We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.
>
> "* * * * *"

The Supreme Court of Pennsylvania in *Commonwealth* v. *Johnson*, 211 Pa. Super. 62, 234 A. 2d 9, the Supreme Court of Maine in *Shone* v. *State*, 237 A. 2d 412, and the Supreme Court of Ohio in *In Re. Agler*, 240

N. E. 2d 874, have held juveniles not to be entitled to jury trials in juvenile proceedings.

The Supreme Court of Nebraska in the instant case, speaking through Judge Carter said:

"* * * * *

"* * *. In requiring a jury trial when demanded, if there is evidence that some criminal act may be involved, the real purpose of the Juvenile Court Act is destroyed. It tosses the juvenile into a trial by jury where he is tried for all intents and purposes as a criminal when this is one of the things the Juvenile Court Act purports to eliminate. Instead of hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, broadcasts to the world the evidence of a crime with which he has never been charged, and reinstates the evils of trying young juveniles on the same basis as adult criminals.

"* * * * *"

The measure of proof in a juvenile proceedings is the same measure as in a civil proceedings.

In *Re Gault, supra*, this Court pointed out:

"* * * * *

"The recommendations in the Children's Bureau's 'Standards for Juvenile and Family Courts' are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under *rules applicable to civil cases* should be admitted in evidence. The New York Family Court Act contains a similar provision.

"* * * * *" (Emphasis supplied.)

The Journal of The American Judicature Society, page 53, emphasizes that the juvenile court system did not just spring out of nowhere but was the culmination of a long history of various types of treatment of offenders. Judge Fort points out the general field of corrections over the hundred years previous to the juvenile court concept and the changes which were taking place from the death penalty for minor offenses in England, banishment to penal colonies, through prisons with two-by-four cells, through the first concept of parole adopted in Massachusetts in 1887. He emphasizes that it was against this background that Dean Pound referred to the juvenile court concept as the most important development in the science of criminal law since the Magna Carta. After then pointing out the criticism by the United States Supreme Court of the doctrine of "*parens patriae*" upon which the juvenile court concept is based, Judge Fort emphasizes that this doctrine should not be abandoned and to do so would be unnecessary and unwise. He then states:

"* * * * *

"* * *. To do so would not only be the clearest violation of the principle of stare decisis but would require the adoption of an entirely new legal theory upon which to support the juvenile court—with all of the problems which this would entail.

"* * * * *"

He then points out that *Gault* and *Kent* decisions, *supra*, by their very emphasis as to the differences between juvenile and adult courts (discussed earlier) would not result in the curtailment of the juvenile court but that working with both the doctrine of *parens patriae* and these decisions the rights of the State and of the child to fair treatment and the essentials of due

process could nevertheless be maintained. The Judge then predicted:

"* * * * *

"*Gault* then is not adversity for the juvenile court. Rather it offers the clear opportunity to strengthen and develop with the framework of its basic philosophy. I have no doubt but that this will come to pass.

"* * * * *"

The prosecuting attorney, who in Nebraska is the County Attorney, is required to determine whether a juvenile complaint or a criminal complaint shall be filed. Ordered liberty requires that someone be required to make a decision at some point. There is no logical reason why someone other than the prosecutor should make it.

Respectfully submitted,

HOMER BRAINARD, Sheriff of
Dodge County, Nebraska,
APPELLEE

By RICHARD L. KUHLMAN,
County Attorney of
Dodge County,
Fremont, Nebraska 68025
and
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SUPREME COURT, U. S.

FILED

MAY 29, 1969

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted]

45

CLARENCE DEBACKER,

Appellant,

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLANT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 662

CLARENCE DEBACKER,

Appellant,

v.

HOWARD BRAUSARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of Nebraska appears at Appendix 23. It is reported at 183 Neb. 461, 161 N.W. 2d 508.

The judgment of the Nebraska Supreme Court pursuant to its opinion appears at A. 32.

Jurisdiction

The judgment of the Nebraska Supreme Court was entered on October 4, 1968 and the notice of appeal was filed therein on October 7, 1968. The appeal was docketed in this Court on October 17, 1968, and probable jurisdiction was noted on February 24, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1257 (2).

Constitutional Provisions and Statutes Involved

This appeal involves the Sixth and Fourteenth Amendments to the Constitution of the United States; the Nebraska juvenile court statutes, §43-201-220; and Sections 83-430 and 28-601(2), Revised Statutes of Nebraska 1943. Pertinent provisions are reprinted in Appendix A, *infra*.

Questions Presented

I

Whether provision of Nebraska Juvenile Court Act denying juvenile trial by jury in juvenile court for offense which would be triable by jury if committed by an adult, violates Sixth Amendment in light of *Application of Gault*, 387 U.S. 1; *Duncan v. Louisiana*, 391 U.S. 145; and *Bloom v. Illinois*, 391 U.S. 194.

II

Whether, in light of *Gault*, statute providing for proof by preponderance in delinquency proceeding, based on misconduct which would be felony if charged criminally, violates Fourteenth Amendment.

III.

Does Nebraska Juvenile Court Act, as construed by state supreme court, deny juvenile due process when prosecutor is vested with unreviewable discretion to proceed in juvenile court, or under the criminal code, thereby giving prosecutor sole power to determine whether juvenile shall have right to jury trial and whether prosecution's burden of proof is by preponderance or beyond a reasonable doubt.

Statement of the Case

DeBacker, a seventeen year old boy, gave a $30.00 check bearing the signature "Donald J. DeBacker," his father, to the O. P. Skaggs store for groceries on January 26, 1968 (A. 24). He told the clerk, who knew his father and mother and who had taken checks from his father previously, that his father's signature was on the check (A. 24). The boy gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for him and needed more food (A. 24). His mother was very jittery and told him to sign his father's name to a check blank which he had given him, assuring him that it was all right for him to go ahead and write the check (A. 24). The boy did so, signing his father's name (A. 24). His mother went to the grocery store with him and he went in and got groceries and approximately $10.00 change (A. 24). It was stipulated that his father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check; and that he told the police perhaps his wife and son may have had something to do with the check (A. 24).

proceedings. Since it was held in *Duncan* v. *Louisiana*, 391 U.S. 145, that "trial by jury in criminal cases is fundamental to the American scheme of justice" and since *Gault* made clear that a delinquency proceeding from which incarceration can result "is comparable in seriousness to a felony prosecution", it follows that, in such a proceeding, a state cannot deny a jury trial.

The debatable desire for informality and the expeditious application of rehabilitative techniques do not justify constitutional short-cuts in juvenile court. The hallmark of totalitarian government is the premise that Big Brother knows what is best for the citizen, young or old, and if he thinks a citizen needs rehabilitation, procedural safeguards which might interfere with its prompt application are an annoying interference with the smooth workings of the system and are thus dispensable for the common good.

The fact that juries, more often than judges, might tend to acquit juveniles, is no constitutional excuse for making juries unavailable. The fact that jurors occasionally exercise an informal pardoning power, by acquitting in the face of technical proof of guilt, is one of the reasons for the continued vitality of the jury system. A youth as well as an adult is entitled to the interposition of an American jury between him and his government.

II.

A civil standard of proof is not constitutionally permissible in a proceeding which can lead to confinement for years. Nebraska, along with all other American jurisdictions, requires proof beyond a reasonable doubt to sustain a criminal conviction. Nebraska even requires a stricter standard of proof than "preponderance of the evidence"

in certain civil actions, i.e., actions based on fraud, etc. A state's incarceration of a juvenile on a far less strict standard of proof than is applied to an adult denies a juvenile equal protection of the laws and due process.

It is time to stop playing with words when individual liberty is at stake. A case is either civil or criminal and any case in which an individual is subject to confinement because of his volitional conduct, as distinguished from conduct which is the product of mental disease or deficiency, or a status, such as dependency, alcoholism, or being the victim of disease or contagion, is a criminal case.

III.

Due process demands that the decision as to whether a juvenile is to go to juvenile court or criminal court be made by someone other than his prosecutor under standards amounting to more than whim or caprice. Nebraska's Juvenile Court Act, as construed by its highest court, leaves this critical decision to the prosecutor's unfettered and unreviewable discretion.

Due process cannot depend upon the whim of any state officer outside the judicial system. Even though a state may not be constitutionally required to provide a juvenile court system, once it elects to do so, due process requires that the juvenile and his counsel have some voice as to which court will best protect the juvenile's interest and serve his needs.

Other jurisdictions provide either statutory standards, or some sort of judicial screening, in an effort to minimize the arbitrary selection of the forum.

ARGUMENT

I.

A Juvenile Charged With Violation of a State Criminal Law as the Basis for an Adjudication of Delinquency Is Constitutionally Entitled to Trial by Jury in Juvenile Court if the Offense Is One Which Would Give Rise to a Constitutional Right to Trial by Jury if Committed by an Adult and Triable in an Adult Criminal Court.

"We live in a sea of semantic disorder * * *"[3] and in this century the constitutional rights of juveniles have been drowned in it. Insisting that incarceration of a child in an industrial school, not to punish him, but to furnish him "guardianship, maintenance, and care for his benefit and that of society is not an interference with personal liberty requiring a trial by jury to justify it,"[4] courts have solemnly held that the Constitution was not for juveniles since the state could prescribe incarceration for their welfare in the same manner as their parents. It was argued just as sincerely, over forty years ago, that child labor laws were unconstitutional because they interfered with the child's constitutional freedom to contract to work in a coal mine or a sweat shop. Proponents of the "civil" philosophy are arguing, in essence, that a sandbur will become an orchid, if we label it so often enough and sincerely enough, because, after all, we will all be better off with orchids.

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[3] Pres. Eisenhower, State of the Union message, Jan. 1960.

[4] *Laurie* v. *State*, 108 Neb. 239, 188 N.W. 110, quoting *Wisconsin Industrial School for Girls* v. *Clark County*, 103 Wis. 651, 79 N.W. 422.

Juveniles, as well as adults, had been entitled to jury trials[5] and the first juvenile court act even provided for jury trials.[6] Nebraska was no exception. As pointed out by the majority here:

> "At its inception in 1905, and until 1963, the Nebraska Juvenile Court Act, with respect to jury trials in juvenile court, provided: 'In all trials under this act where a delinquent child is charged with crime, any person interested therein may demand a jury or the judge of (on) his own motion may order a jury to try the case; * * *.' See Laws 1905, c. 59, s. 2, p. 306, now s. 43-202, R.R.S. 1943.
>
> This specific provision for a jury trial was effectively eliminated by this court. We held that charging a child with being delinquent did not charge him with a crime, even though the facts alleged would have constituted a specific charge of crime if made against an adult. Such charges, we said, merely set forth the necessary facts showing him to be delinquent. See Laurie v. State, 108 Neb. 239, 188 N.W. 110" (A. 26).

State ex rel. Weiner v. *Hans,* 174 Neb. 612, 119 N.W. 2d 72 (1963) was the last case, prior to this one, in which the Nebraska Supreme Court was faced with a juvenile's de-

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[5] *Ex parte Becknell,* 119 Cal. 496, 51 P. 692 (1897), contra, *Ex parte Ah Peen,* 51 Cal. 280 (1876); *People* v. *Turner,* 55 Ill. 280, 8 Am. Rep. 645 (1870); *State* v. *Ray,* 63 N.H. 406, 56 Am. Rep. 529 (1885); *Matter of Daniecki,* 117 N.J. Eq. 527, 177 A. 91 (1935). See also Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 400-401 (1961); Fortas, Equal Rights—For Whom, 42 N.Y.U. L. Rev. 401, 405 (1967).

[6] "(I)n all trials under this act any person interested therein may demand a jury of six, or the judge of his own motion may order a jury of the same number, to try the case." Laws of Ill. §2 (1899), cited in S. Glueck & E. Glueck, One Thousand Juvenile Delinquents 12 (1943).

mand for a jury trial. A jury trial was sought under the plain provisions of the 1905 Juvenile Court Act. The court adhered to its previous decisions and held the allegations constituting a crime had reference only to the charge of delinquency. In his last utterance as Chief Justice, Robert G. Simmons, C.J., succinctly dissented as follows:

> "I dissent from that part of the court's opinion that approves the denial of a jury trial. The rule adopted permits the prosecution to elect whether the accused shall have a jury trial or a trial by the court. The facts charged constitute a felony. By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide."

A juvenile now has no right to a jury trial in juvenile court in the great majority of jurisdictions. According to a compilation in the Winter 1969 issue of the North Dakota Law Review (the entire issue is devoted to a symposium on the juvenile offender and the law), at page 258, only twelve jurisdictions provide some form of jury trial for juveniles.[7] Twenty-seven other jurisdictions deny juveniles a jury trial.[8]

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[7] Alaska Stat. §47.10.070 (Supp. 1966); Colo. Rev. Stat. Ann. §37-8-2 (1964); D.C. Code Encyclopedia §16-2307 (1961); Kan. Gen. Stat. Ann. §38-808 (Supp. 1967); Mich. Comp. Laws Ann. ch. 712A. 17 (1968); Mont. Rev. Codes Ann. §10-603 (1947); Okla. Stat. Ann. tit. 10, §1110 (Supp. 1968); S.D. Code §43.0331 (1939); Tex. Rev. Civ. Stat. Ann. art. 2338-1, §13 (b) (Vernon Supp. 1968); W. Va. Code Ann. §4904 (53) (1961); Wis. Stat. Ann. §48.25(2) (1957); Wyo. Stat. Ann. §14-108(c) (1961).

[8] 18 U.S.C. §5063 (1964), found partially unconstitutional in *Nieves* v. *United States*, 280 F. Supp. 994 (S.D.N.Y. 1968); Ala.

Bloom v. *State of Illinois*, 391 U.S. 194, teaches that substance rather than form dictates the availability of jury trial. The Court noted its reluctance to overturn the firmly entrenched constitutional principle that serious contempts were not triable to a jury,[9] but said that neither the historical support for the principle, "nor the considerations of necessity and efficiency normally offered in defense of the established rule, justify denying a jury trial in serious criminal contempt cases."[10]

The Court's treatment of criminal contempt in *Bloom* decisively answers the argument that a judgment of incarceration in a state institution for juveniles results from a civil proceeding. We think the following statement of the Court applies just as precisely to juvenile delinquency proceedings leading to confinement in a state institution as to contempt:

Code, tit. 13, §369 (1969); Ariz. Rev. Stat. Ann. §8-229 (1956); Ark. Stat. Ann. §45-206 (1964); Del. Code Ann. tit. 10, §1175 (Supp. 1966); Fla. Stat. Ann. §39.09(2) (1961); Ga. Code Ann. §24-2420 (1959); Hawaii Rev. Laws §333-19 (1 Session Laws of Hawaii act 232 (1965)); Idaho Code Ann. §16-1813 (Supp. 1967); Ind. Stat. Ann. §9-3215 (Supp. 1968); Iowa Code Ann. §232.27 (Supp. 1968); Ky. Rev. Stat. §208.060 (1962); La. Rev. Stat. Ann. §13:1579 (West 1968); Minn. Stat. Ann. §260.155 (Supp. 1967); Miss. Code Ann. §7185.08 (1942); Neb. Rev. Stat. §43-206.03 (Supp. 1965); Nev. Rev. Stat. §62.190(3) (1963); N.J. Stat. Ann. §2A:4-35 (1963); N.M. Stat. Ann. §13-8-49 (Supp. 1967); jury provision found unconstitutional in *Peyton* v. *Nord*, 437 P.2d 716 (N.M. 1968), at least where criminal laws require trial by jury; N.Y. Crim. Proc. Law §913-h (McKinney 1958); N.D. Cent. Code §27-16-18 (Supp. 1967); Ohio Rev. Code Ann. §2151.35 (1964); Ore. Rev. Stat. §419.498 (Supp. 1967); Pa. Stat. Ann. tit. 11, §247 (1954); Utah Code Ann. §55-10-94 (Supp. 1967); Vt. Stat. Ann., tit. 33, §651(a) (Supp. 1968); Wash. Rev. Code Ann. §13.04.030 (1962).

[9] 391 U.S. 197, 198.

[10] 391 U.S. 198.

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:

> 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.' Gompers v. United States, 233 U.S. 604, 610, 34 S.Ct. 693, 695, 58 L.Ed. 1115 (1914).

Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates.

Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. * * * "[11]

This court has already made clear in *Application of Gault,* 387 U.S. 1, 27, that a juvenile delinquency proceeding leading to incarceration is a criminal case:

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[11] 391 U.S. 201, 202.

"Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. * * *

* * * * *

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and

his 'wanting to go to * * * Grand Canyon with his father,' the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute. *The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case.* * * *" (Emphasis supplied.)

This Court has also answered in *Bloom, supra,* the argument that expeditiousness and ephemeral considerations, such as the juvenile's feelings about the process he is being subjected to, excuse denying him the fundamental procedural right of trial by jury. As succinctly put by the Court at 391 U.S. 208:

"We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and are not persuaded that the additional time and expense possibly involved in submitting serious contempts to juries will seriously

handicap the effective functioning of the courts. We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial. The goals of dispatch, economy, and efficiency are important, but they are amply served by preserving the power to commit for civil contempt and by recognizing that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."

Though rarely articulated, lurking just beneath the surface of all arguments that juveniles must not have juries, is the fear that, in some cases, a jury might acquit a juvenile and thus spare him from the benevolent rehabilitative techniques of the state. The decision in *Bloom* also succinctly disposes of this argument, 391 U.S. 209:

"* * * In isolated instances recalcitrant or irrational juries may acquit rather than apply the law to the case before them. Our system has wrestled with this problem for hundreds of years, however, and important safeguards have been devised to minimize miscarriages of justice through the malfunctioning of the jury system. Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt."

The New York Court of Appeals in *People* v. *Fuller*, 5 CrL 2097, decided April 10, 1969, held that the Fourteenth Amendment equal protection clause requires a jury trial in the addiction commitment of persons convicted of narcotics offenses. The court, speaking through Keating, J.:

> "The issue in both proceedings is identical. Convicted addicts committed to the control of the Commission are in theory subjected to the same intensive rehabilitation program and are to be released when cured, whether or not the length of deprivation of freedom is proportional to the gravity of the act for which they were committed (See Mental Hygiene Law, Section 204)."
>
> * * * * *
>
> "The fruitlessness of an argument based on a simplistic view that we are not involved here with a guilt-finding mechanism is readily apparent when it is recalled that the most important consequence of a finding of guilty is not only the stigma of conviction but, more importantly, the incarceration which normally attends the finding. * * * It is the substance, not the form that will control. * * *"
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> * * * * *
>
> "One final argument made is that requiring jury trials will impose a tremendous burden on the courts. Something more than this is required. * * *"

We have not extended this brief with citations to, or quotes from, the massive array of literature on this subject. This Court's decisions in *Gault, Duncan,* and *Bloom*

have so completely mooted the arguments, pro and con, that no further explication is necessary.

Duncan's imposition on the states of the right to jury trial in cases where the potential punishment exceeds six months incarceration certainly indicates that DeBacker, committed until his twenty-first birthday pursuant to Section 43-210.02 R.R.S. 1943 a term that could exceed three years, is entitled to trial by jury.

II.

Statute Providing for Proof by Preponderance in Delinquency Proceeding, Based on Misconduct Which Would Be Felony if Charged Criminally, Violates Fourteenth Amendment.

Nebraska has long recognized the American tradition that "guilt in a criminal cause must be proved beyond a reasonable doubt." [12] In 1892, the Nebraska Supreme Court said in *Binkley* v. *State*, 34 Neb. 757, 52 N.W. 708 that:

> " • • • Guilt is not to be established by mere conjecture or suspicion, however strong. All experience has shown that a party may be wholly innocent of the offense of which he is accused, although appearances may be against him. The law, therefore, to guard against injustice requires, that the offense be established by evidence beyond a reasonable doubt. It is a serious matter, not only to a party, but to the state as well, to take a person from the ordinary avocations of life, brand him as a felon and deprive him of his liberty, appropriate his labor and cast a cloud upon

[12] *Brinegar* v. *United States*, 338 U.S. 160, 173, 174-175 (1949).

his future life and humiliate his relatives and friends; and to authorize the state in doing this there should be no reasonable doubt of his guilt."

Since DeBacker's case is a criminal case, in any realistic sense of the term, the state denies him due process and the equal protection of the laws when it incarcerates him on a civil standard of proof. The basic standard of proof in a civil action in Nebraska is "a preponderance of the evidence therein."[13] However, where a plaintiff seeks to overcome the presumption arising from the express term of a deed by parole evidence, much more certainty and conclusiveness are required than in ordinary cases,[14] and when a litigant seeks to overcome by parole evidence a presumption arising from express terms of conveyance and relations of parties concerned therein, the quality of evidence must be clear, satisfactory and convincing.[15]

Four judges of the Nebraska Supreme Court would strike down as unconstitutional Section 43-206.03, R.S. 1943, incorporating a preponderance of the evidence standard for delinquency proceedings, relying on *In re Urbasek*, 38 Ill. 2d 535, 232 N.E. 2d 716 and *United States* v. *Costanzo*, 395 F. 2d 441 (4th Cir.) (A. 31).

The highest courts of our two most populous states have grappled with the standard of proof in delinquency proceedings since this case was decided by the Nebraska Supreme Court. The Supreme Court of California, in *In re M.*, 75 Cal. Rptr. 1, 450 P.2d 296, decided February 20,

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[13] *Search* v. *Miller*, 9 Neb. 26, 1 N.W. 975 (1879).

[14] *Doane* v. *Dunham*, 64 Neb. 135, 89 N.W. 640 (1902).

[15] *Hein* v. *W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W. 2d 185 (1958).

1969, held that a statute declaring that a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support adjudication of delinquency, is not clearly and positively unconstitutional, Peters, J., dissenting. The Court of Appeals of New York, in a four to three decision *In the Matter of Samuel W.*, No. 616, —— N.Y. 2d ——, decided March 6, 1969, held that the reasonable doubt standard was not required in juvenile cases. Since *Gault*, we have appellate decisions in Illinois;[16] Texas;[17] New York (*In re Samuel W., supra*); California (*In re M., supra*); Nebraska (this case), United States Court of Appeals for the Fourth Circuit[18] and the District of Columbia.[19] Greater judicial division could scarcely exist on a problem. Illinois, Texas, the Court of Appeals for the Fourth Circuit and four of the seven judges on the Nebraska Supreme Court would apply the reasonable doubt standard and a majority of the judges of the courts of California, New York, and the District of Columbia would apply the civil standard. The decisions for the civil standards, however, continue to rely on the premise that juvenile delinquency proceedings are civil.

The California Supreme Court assumed, *In re M.*, 450 P.2d 296, 301, that the reasonable doubt standard "is part of the due process of law guaranteed in criminal cases by the Fourteenth Amendment referring to *Speiser* v. *Randall* (1958), 357 U.S. 513, 525-526. The court, however, still clung to the traditional approach to juvenile court fact-

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[16] *In re Urbasek*, 38 Ill. 2d 535, 232 N.E. 2d 716 (1967).

[17] *Santana* v. *State* (Tex. Civ. App. 1968), 431 S.W. 2d 558.

[18] *United States* v. *Costanzo*, 395 F.2d 441, 445.

[19] *In re Wylie* (D.C. Mun. App. 1967), 231 A. 2d 81, 84.

finding making the following remarkable statement at 450 P.2d 303:

> " * * * thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interests of the youth may well be served by a prompt factual decision at a level short of 'moral certainty.' "

How the best interests of a youth may be served by incarcerating him on the basis of a "prompt factual decision at a level short of moral certainty" escapes us. We also believe that a determination of whether or not a juvenile is to be rehabilitated, particularly when such rehabilitation may well involve incarceration for several years (just as rehabilitation of an adult sometimes requires incarceration for a like term) is the "very heart" of a juvenile proceeding and, if a juvenile wishes to contest the supposed need for his rehabilitation, what rational basis is there for denying him the same procedural rules available to an adult who wishes to contest his incarceration?

The California court lists the present lineup of commentators pro and con at 450 P.2d 305, and noted, at 450 P.2d 304, that "the National Conference of Commissioners on Uniform State Laws adopted the Illinois position (*In re Urbasek* (1967), *supra*, 38 Ill. 2d 535, 232 N.E. 2d 716) in requiring proof beyond a reasonable doubt in delinquency cases, but remain satisfied with the clear and convincing evidence standard in determining neglect or need of treatment. (Uniform Juvenile Court Act) (Final draft, August 1968, §29.)"

We think the commissioners' proposed standards are correct. The determination of neglect or need of treatment, where the volitional act of a juvenile of the age of criminal responsibility is not involved, is not a criminal matter and should not be treated as such.

Justice Peters dissented at 450 P.2d 309, pointing out:

> "* * * certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case. This the majority concede. But the majority contend that the determination that the minor shall be a ward of the court is not criminal in nature. The majority spend 33 pages of lengthy discussion that does no more than confuse the issue. It urges that in juvenile proceedings these rights are not fundamental. Certainly to the minor the proceedings are adversary and criminal in nature. The determination that the minor shall be a ward of the court may result in the confinement of the minor during minority and complete restriction on his freedom of action. Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation and, as well, is contrary to the teachings of Gault."

The Court of Appeals of New York, *In the Matter of Samuel W.*, #616, —— N.Y. 2d ——, March 6, 1969, insisted that a juvenile proceeding is not criminal saying that, even if a juvenile is incarcerated, the statute provides that his adjudication is not a "conviction" and affects no

right or privilege (slip opinion page 4). The fallacy of this approach is apparent if one stops to consider whether removing the usual civil disabilities from felony convictions and denominating them "adjudications" would be a constitutional excuse for doing away with the adversary system of criminal justice as we know it today. This argument demonstrates again the problems of those who would restrict juveniles to second class justice. They must continually find and attach labels to obscure the realities of the situation, yet we have not read a convincing argument that the unique benefits of the juvenile court system require constitutionally diluted fact-finding procedures. No one has pointed out why all of the supposed benefits of the juvenile court—the kindly judge—placements made by friendly social workers—confidentiality of records and proceedings —and state assurance that no adverse consequences will flow from the adjudication, are not readily available and capable of implementation after adjudication made by jury on a standard of proof beyond reasonable doubt. Proponents of the present system seem to argue that a juvenile should not get something for nothing and that if all these benefits are to be showered upon him, whether he likes it or not, he should be willing to give up some of his most basic constitutional rights.

Fuld, Chief Justice, dissented, joined by Burke and Keating, JJ. We think we can make no better argument than Chief Justice Fuld and we adopt it as follows:

> Once the Supreme Court decided that the child was entitled, as a matter of due process, to notice of charges, to counsel, to the rights of confrontation and examination and the privilege against self incrimination—because the proceeding is 'comparable in seriousness to a

felony prosecution' (387 U.S., at p. 36) and because the 'safeguards available to adults' in 'a normal criminal case * * * [may not be] discarded in [a child's] case' (p. 29)—it necessarily follows that a finding of guilt, the prerequisite in this case for imprisonment until the boy's eighteenth year, may not be predicated upon less than proof beyond a reasonable doubt.

There may not be any decision expressly stating that the reasonable doubt standard is an essential aspect of due process in criminal prosecutions. But who could question that it is? That standard has been so deeply imbedded in our law, is so fundamental and universal, that no one would venture in an ordinary criminal case to apply a standard less stringent. It is essential to due process not only because of the deprivation of liberty which could result but also because of the vital part it plays in the entire criminal procedural scheme. For example, the burden of proof is closely related to the privilege against self incrimination—as a device to offset the adverse effect of a defendant's failure to defend himself. It also compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants. Manifestly, a person accused of a crime, whether he be an adult defendant in a criminal case, or a child charged as a delinquent, would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

My conclusion is not without support in judicial decision. At least two courts have also concluded that, in the light of *Gault* (387 U.S. 1, *supra*), due process demands that the proof in a delinquency proceeding be

beyond a reasonable doubt. (See *In re Urbasek,* 38 Ill 2d 535; *United States* v. *Costanzo,* 395 F 2d 441; see, also, Dorsen and Rezneck, Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec. 1967] pp. 25-27. But see, contra, *In re Wylie,* 231 A 2d 81; *Debacker* v. *Brainard,* 183 Neb. 461, probable jurisdiction noted Feb. 24, 1969, 37 U.S.L.W. ——.) Thus, in the *Costanzo* case (395 F 2d 441, *supra*), the Federal Court of Appeals for the Fourth Circuit declared (pp. 444-445):

"Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional commitment must be regarded as 'criminal.' We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. [Case cited.] *The government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult.* * * * In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection [p. 444].

* * * * *

"* * * It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same" [p. 445]. (Emphasis supplied.)

And in the *Urbasek* case (38 Ill 2d 535, *supra*), the high court of Illinois, noting that the language of the opinion in *Gault* 'exhibits a spirit that transcends the specific issues there involved' (p. 541), wrote that (pp. 540-541)

> "it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that *a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged* [p. 540].
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> "* * * When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution * * * we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics. * * * the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal Prisons" [p. 541]. (Emphasis supplied.)

It may well be, as the court observes (Opinion, p. 6), that there is but a 'tenuous difference' between 'a fair preponderance of the evidence' and 'proof beyond a reasonable doubt.' But the simple fact is that the Family Court judge in the case before us saw a difference between those standards. In reaching his decision that the appellant was guilty, he explicitly acknowledged that he was basing his findings of fact on the 'preponderance of evidence' and frankly admitted that the proof fell short of establishing guilt or delinquency beyond a

reasonable doubt. Along with Dorsen and Rezneck (Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec. 1967] p. 27), I too find it difficult to understand 'how the distinctive objectives of the juvenile court give rise to legitimate institutional interest in finding a juvenile to have committed a violation of criminal law on less evidence than if he were an adult.'

It has been aptly said that the prosecution's duty to establish guilt beyond a reasonable doubt 'is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."' (*Leland* v. *Oregon,* 343 U.S. 790, 802-803, *per* Frankfurter, J., dissenting.) With the *Gault* case on the books, it follows, I suggest, that where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process, as well as of equal protection, the case against him must be proved beyond a reasonable doubt.

III.

The Critically Important Decision of Whether a Juvenile Is to Be Handled in Criminal Court or Juvenile Court Cannot Be Left to the Discretion of a State Officer Outside the Judicial System.

Section 43-205.04, R.R.S. 1943, provides that a minor under the age of eighteen years who is detained under the provisions of the Act, shall be released within forty-eight hours after having been taken into custody, excluding non-judical days, unless within that time (1) a petition has been filed alleging that such minor has violated an order of the juvenile court, (2) a petition has been filed pursuant to the

act, or (3) a criminal complaint has been filed. The Nebraska Juvenile Court Act does not require that juveniles accused of crime be proceeded against under it. As noted by Judge McCown, speaking for four judges in this case:

> "Some of the juvenile court acts made the jurisdiction of the juvenile court exclusive, and some provided for a waiver by the juvenile court to the adult criminal court. The Nebraska pattern created a concurrent jurisdiction as to criminal misconduct, and enabled the county attorney to determine whether to file an action under the general criminal laws of the state, or a delinquency proceeding in the juvenile court. See, State v. McCoy, 145 Neb. 750, 18 N.W. 2d 101; Fugate v. Ronin, 167 Neb. 70, 91 N.W. 2d 240" (A. 25).

A state doubtless is under no more obligation to provide a juvenile court system than it is appellate review. *Cf. Griffin* v. *Illinois,* 351 U.S. 12, 18. But if if does so, it cannot make the advantages and disadvantages applicable on the basis of the prosecutor's whim. In *Lane* v. *Brown,* 372 U.S. 477, the Court refused to sanction a procedure where the refusal of a public defender to take an appeal prevented an indigent prisoner from having a transcript, saying at 372 U.S. 485:

> "* * * The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigence alone, does not meet constitutional standards."

It is submitted that a procedure permitting a prosecutor to choose a criminal or juvenile court forum is likewise constitutionally defective. During the oral argument of this

case in the Nebraska Supreme Court, Judge Newton observed that, if appellant's challenge was sustained, prosecutors might elect to prosecute more often in criminal court since their burden would be the same. If this Court sustains appellant's challenge, and places upon the prosecutor basically the same burdens he faces in criminal court, then the danger might be real and a juvenile should not be deprived of the supposed dispositional advantages, including the disabilities flowing from a felony conviction, because of the prosecutor's whim. On the other hand, if the Court decides that a juvenile is to continue to be seriously procedurally disadvantaged in juvenile court, as the price he must pay for its supposed dispositional advantages, then a juvenile ought to be allowed to insist on the procedural advantages of the criminal court if he and his counsel decide that such a course would be in his best interests. If a juvenile wishes to contest the criminal misconduct alleged against him, he is surely entitled to the same weapons as his adult counterpart.

As Mr. Justice Frankfurter observed: "Law addresses itself to actualities."[20] The actualities here are that all states have juvenile court systems and, while this Court in *Kent* v. *United States*, 383 U.S. 541, was dealing with waiver as a part of a statutory scheme, it seems to us the Court at least implied that due process has a role, quite apart from statutory language, to play in the determination of the court in which a juvenile delinquent is to be handled. We find this implication in the following language at 383 U.S. 554:

> "We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our

[20] *Griffin* v. *Illinois*, 351 U.S. 12, 23, concurring.

> system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act permitted this procedure. We hold that it does not."

Nebraska has a similar statutorily declared societal concern for children. Section 43-218, R.R.S. 1943, declares:

> "This act shall be liberally construed to the end that its purpose may be carried out, namely, that the care, custody and discipline of a dependent, neglected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all cases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise."

In holding that Kent was entitled to a hearing on the question of waiver, including access by his counsel to the social records and to a statement of reasons for the juvenile court's decision, this Court believed the results to be "required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." 383 U.S. 557.

It was held in *Nieves* v. *United States*, D.C.S.D., N.Y., 280 F.Supp. 994, by a three-judge court, that:

> "to the extent it deems consent to FJDA proceedings a waiver of jury trial and requires that these proceed-

ings be held without jury, 18 U.S.C. §5033 (1964) impairs a juvenile's free exercise of his Sixth Amendment right and is therefore invalid."

The court went on to say that since the government had decided to permit Nieves to proceed under the FJDA, he was entitled to choose to do so or elect criminal prosecution, being entitled to a trial by jury in either event. 280 F.Supp. 1006. We think that *Nieves* stands for the proposition that an accused juvenile has a right to choose his forum without incurring procedural disadvantages. We are aware that the FJDA authorizes the Attorney General, in his discretion to direct criminal proceedings against a juvenile,[21] and that this is similar to the Nebraska procedure with the exception that the local United States Attorney cannot make the choice, as can the local Nebraska prosecutor. This federal procedure is probably not as objectionable as the Nebraska procedure since the decision is made by an official far removed from whatever influence local passion might bring to bear, but we think it is also constitutionally infirm because, as we have pointed out, no prosecutor should be able to make a decision of such "tremendous consequences" in his sole discretion.

Texas has recently amended its juvenile court act to provide waiver standards consonant with due process for the juvenile and the state's interest in prosecuting the seriously criminal delinquent.[22] The Texas statute provides for a hearing with appointed counsel who has access to the records, a diagnostic study and full evaluation with emphasis placed on the retention of juvenile jurisdiction unless the

[21] 18 U.S.C. §5032.

[22] Vernon's Annotated Rev. Civ. Statutes, Art. 2338-1 §6.

seriousness of the events in the background of the offender considered with the welfare of the community indicates otherwise. Statutory guidelines are set forth providing that weight is to be given to whether the offense was against person or property, offenses against property being considered less serious, and whether the offense was aggressive or premeditated. The juvenile judge is admonished statutorily to consider the sophistication and maturity of the child together with his record and prior history along with his prospects of rehabilitation with the juvenile court facilities available, balanced against society's need for protection. The Texas statute appears to be patterned after the policy memorandum of the Juvenile Court of the District of Columbia set forth as an appendix to *Kent* v. *United States* at 383 U.S. 565.

We think juvenile courts have become too much a part of our tradition to permit their availability to rest on the arbitrary decision of a prosecutor.

Conclusion

The desirable functions of the juvenile court system will in no way be impaired by this Court's insistence that the liberty of a child is as precious as that of an adult. When the final result of a delinquency proceeding can be the transfer of a child from an industrial school to an adult penal institution for a term not to exceed two years,[23] the actualities of the situation require the imposition of all safeguards traditionally accorded those accused of crime.

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[23] Section 83-455 R.R.S. 1943.

Judge Spencer, of the Nebraska Supreme Court, put the issues in this case in their proper perspective when he said:

> "With a background of several years' experience in juvenile matters, I can appreciate the position of the many conscientious experts on juvenile problems who believe that it is to the best interests of the child that a public trial, with all its connotes, be avoided, and that the case of the juvenile be processed as informally as possible. Yet, I am persuaded that it is my duty to keep ever in mind that a child, as well as an adult, is entitled to all constitutional protections and that his rights cannot be determined by the criterion of what I may feel is best for him. The decision on a question of a waiver of his constitutional rights is a decision that must be made for him by his legal representative" (A. 43-44).

The decision of the Supreme Court of Nebraska should be reversed with directions to enter judgment declaring the Nebraska Juvenile Court Act unconstitutional insofar as it denies a juvenile a jury trial, permits him to be adjudicated a delinquent on the basis of a preponderance of the evidence and vests the prosecutor with the sole power to determine the forum in which the juvenile will be proceeded against.

Respectfully submitted,

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APPENDIX

APPENDIX A

Sixth Amendment to the Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the United States

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Reissue Revised Statutes of Nebraska 1943:

83-455. Penal and Correctional Complex; inmates; transfer to from Boys' Training School; incorrigibility. The Department of Public Institutions, with the approval of the Board of Pardons, may transfer any person sixteen years of age, or over, from the Boys' Training School because of

incorrigibility to the Nebraska Penal and Correctional Complex for custody and care for a term not to exceed two years.

28-601. Forgery, defined; penalty. . . . (2) whoever shall utter or publish as true and genuine or cause to be uttered or published as true and genuine or shall have in his possession with intent to utter and publish as true and genuine, any of the above-named false, forged, counterfeited, falsely printed or photographed matter, above specified and described, knowing the same to be false, altered, forged, counterfeited, falsely printed or photographed, with intent to prejudice, damage or defraud any person or persons, body politic or corporate, shall be imprisoned in the Nebraska Penal and Correctional Complex for any space of time not exceeding twenty years nor less than one year, and pay a fine not exceeding five hundred dollars.

43-201. Juvenile courts; definition of terms. As used in sections 43-201 to 43-220, unless the context otherwise requires:

(1) This act shall be construed as referring exclusively to sections 43-201 to 43-220;

(2) Dependent child shall mean any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

(3) Neglected child shall mean any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian;

43-205. Juvenile court; proceedings; by whom and how instituted; title of proceedings. The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a child

in his county who appears to be neglected, dependent, delinquent, or a child in need of special supervision, may file with the clerk of the court having jurisdiction in the matter, a petition in writing, setting forth the facts verified by affidavit. It shall be sufficient if the affidavit is upon information and belief. Such petition and all subsequent proceedings shall be entitled In the Interest of , a Child Under Eighteen Years of Age, inserting the child's name in the blank.

43-205.01. Juvenile courts; child taken into custody without warrant; age limit; grounds; not deemed an arrest. A child under the age of eighteen years may be taken into custody by any officer of the peace without a warrant or order of court (1) when in the presence of the officer the child has violated a state law or municipal ordinance; (2) when a felony has been committed and he has reasonable grounds to believe such child committed it; (3) when such child is seriously endangered in his surroundings, and immediate removal appears to be necessary for his protection; or (4) when there are reasonable grounds to believe that he has run away from his parent, guardian or custodian. Such taking into custody shall not be deemed an arrest.

43-205.02. Juvenile courts; temporary custody of minor; steps to be taken; alternatives permitted. An officer who takes a minor into temporary custody under the provisions of section 43-205.01, shall immediately take reasonable measures to notify the minor's parent, guardian, custodian, or relative and shall thereafter proceed as follows:

(1) He shall release such minor; or

(2) He shall prepare in duplicate a written notice requiring the minor child to appear before the juvenile court or probation officer of the county in which such minor was taken into custody at a time and place specified in the notice. The notice shall also contain a concise statement

of the reasons such minor was taken into custody. He shall deliver one copy of the notice to such minor and require such minor or his parent, guardian, custodian, or relative, or both, to sign a written promise that such signer will appear at the time and place designated in the notice. Upon the execution of the promise to appear, he shall immediately release such minor. He shall, as soon as practicable, file one copy of the notice with the juvenile court or officer appointed by the court for such purpose or the probation officer; or

(3) He shall take such minor without unnecessary delay before the juvenile court or probation officer of the county in which such person was taken into custody and deliver the custody of such minor to the juvenile court or probation officer.

In determining which disposition of the minor he will make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, if such alternative is compatible with the best interests of the minor and the community.

43-205.03. Juvenile courts; temporary custody of minor; investigation by probation officer; release of child, when. Upon delivery to the juvenile court or probation officer of a minor who has been taken into temporary custody under the provisions of sections 43-205.01 to 43-205.05, the court or probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody. The court may then either (1) immediately release such minor to the custody of his parent, guardian, or responsible relative, or (2) admit such minor to bail by bond in such amount and on such conditions and security as the court, in its sole and exclusive discretion, shall determine. In no case shall the court or probation officer release such a minor if it appears that further detention of such minor is a matter of immediate and urgent necessity for the protection of such minor or the person or

property of another or if it appears that such minor is likely to flee the jurisdiction of the court.

43-205.04. Juvenile courts; temporary custody of minors under the age eighteen; release required within forty-eight hours unless complaint or petition filed; exceptions; violation; penalty. Whenever a minor under the age of eighteen years is detained under the provisions of section 43-205.03, such minor shall be released within forty-eight hours after having been taken into custody, excluding non-judicial days, unless within such period of time (1) a petition has been filed alleging that such minor has violated an order of the juvenile court, (2) a petition has been filed pursuant to the provisions of section 43-205, or (3) a criminal complaint against him has been filed in a court of competent jurisdiction, and except when a criminal complaint is filed, an order continuing detention until the adjudication hearing, after a reasonable showing that the necessity for detention still exists, is entered by the juvenile court.

This section shall not apply to a minor who has escaped from a commitment, or to a child who has been taken into custody for his own protection pursuant to subdivision (3) of section 43-205.01, in which latter case the child shall be held for a reasonable time. Any person who knowingly holds a child in detention in violation of any of the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail for a period not to exceed thirty days.

43-205.05. Juvenile courts; temporary custody of minor; taken before juvenile judge promptly. Unless sooner released, a minor taken into custody under the provisions of sections 43-205.01 to 43-205.05 shall be brought before a judge of the juvenile court for an adjudication hearing as soon as possible after a petition has been filed. If the minor is not brought before a judge of the juvenile court

within a reasonable period of time, he shall be released from custody.

43-205.06. Juvenile court; minor under eighteen years; right to counsel; appointment. When any minor under eighteen years of age shall be brought without counsel before a juvenile court within the meaning of Chapter 43, article 2, the judge shall advise such minor and his parents or guardian of their right to retain counsel and shall inquire of such minor and his parent or guardian as to whether they desire to retain counsel. The judge shall inform such minor and his parent or guardian of their right to counsel at county expense if none of them is able to afford counsel. If the minor or his parent or guardian desire to have counsel appointed for such minor, or the parent or guardian of such minor cannot be located, and the judge ascertains that none of such persons are able to afford an attorney, the judge shall forthwith appoint an attorney to represent such minor for all proceedings before the judge in the juvenile court.

43-206. Juvenile court; issuance of process; summons; subpoena. (1) Upon the filing of the petition, a summons with a copy of the petition attached shall issue requiring the person who has custody of the child or with whom the child may be to appear personally and, unless the court orders otherwise, to bring the child before the court, at the time and place stated.

(2) If the petition alleges that the minor is a delinquent child or a child in need of special supervision, a summons, with a copy of the petition attached, shall also be served on said minor requiring him to appear personally at the time and place stated.

(3) If the person so summoned is other than a parent or guardian of the child, then the parent or guardian or both, if their residence is known, shall also be notified of the pendency of the case and of the time and place ap-

pointed; if there is neither a parent nor guardian, or if his or her residence is not known, then some relative, if there be one and his residence is known, shall be so notified; *Provided*, in any case the judge may appoint some suitable person guardian ad litem to act in behalf of the child.

(4) No summons or notice shall be required to be served on any person, except as required by subsection (2) of this section, who shall voluntarily appear before the court and whose appearance is noted on the records thereof.

(5) If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may, by endorsement upon the summons, order the officer serving it to take the child into custody at once.

(6) Subpoena may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

43-206.01. Juvenile court; service of process; manner; time; by whom made. (1) Service of summons shall be made by the delivery of a copy thereof to the person summoned or by leaving one at his usual place of residence.

(2) Notice, when required, shall be given in the following manner:

(a) If the person to be notified resides in the county where the action is pending, by delivery of a copy thereof to the person to be notified or by leaving it at his usual place of residence;

(b) If the person to be notified resides outside or has left the county where the action is pending, by mailing a copy thereof by registered or certified mail to the last known address of such person; or

(c) If after reasonable inquiry, the whereabouts or an address of the parent, guardian or a relative cannot be

ascertained, the court may publish a notice in a newspaper of general circulation in the county in which the proceeding is pending. The published notice shall simply state that a proceeding concerning the child is pending in the court and that an order making an adjudication and disposition will be entered therein. If the names of one or both parents or the guardian are unknown, he or they may be notified as the parent or parents, or guardian of (naming or describing the child) found (stating address or place where the child was found). Such notice shall be published once each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

(3) Personal or residence service shall be effected at least twenty-four hours before the time set for the hearing. Registered or certified mail shall be mailed at least five days before the time of the hearing.

(4) Service of summons, notice or subpoena may be made by any suitable person under the direction of the court.

43-206.02. Juvenile court; failure to appear; warrant; custody of child pending adjudication. If the person summoned or subpoenaed as provided in sections 43-206 to 43-206.04, shall without reasonable cause fail to appear and abide the order of the court or bring the child, he may be proceeded against as in the case of contempt of court. In case the summons cannot be served or the parties served fail to obey the same, and in any case when it shall be made to appear to the court that such summons would be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of a child, or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as legally may be, the court shall proceed to hear and dispose of the case as provided in section 43-206.03; *Provided*, that the hearing shall not be had until there is before the court the minor

when charged under subdivisions (4) and (5) of section 43-201, and in all cases the minor's custodian or person with whom he may be, parent or guardian, or, if they fail to appear, a guardian ad litem.

Pending the adjudication of any case, the child may be retained a reasonable period of time on order of the court in the possession of either the person having the charge of the same or some other suitable person, or may be kept in some suitable place provided by the city or county authorities or given to any proper and accredited charitable institution; *Provided*, the court may order such child examined by a physician, surgeon, psychiatrist or psychologist.

43-206.03. Juvenile court; hearings; adjudication; effect. (1) The hearing as to a child in custody of the probation officer or the court shall be held as soon as possible after the petition is filed, and as to a child not in such custody as soon as practicable after the petition is filed.

(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts.

(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said

child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child.

(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment.

43-206.04. Juvenile court; files; how kept; certain reports and records not open to inspection without order of court. (1) The juvenile court judge shall keep a minute book in which he shall enter minutes of all proceedings of the court in each case, including appearances, findings, orders, decrees and judgments, and any evidence which he feels it is necessary and proper to record. Juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, certificates or receipts of mailing, minutes of the court, findings, orders, decrees, judgments and motions.

(2) The medical, psychological, psychiatric and social welfare reports and the records of juvenile probation officers as relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court.

43-210. Delinquent children; adjudication; alternatives given to court for disposition of case. When any child is adjudicated to be a delinquent child, the court may:

(1) Continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged when the same is in the interest of the child's reformation or rehabilitation and, subject to the further order of the court, may:

(a) Place the child under the supervision of a probation officer;

(b) Permit said child to remain in its own home, subject to the supervision of the probation officer; or

(c) Cause the child to be placed in a suitable family home or institution, subject to the friendly supervision of the probation officer; *Provided*, that under subdivision (1) (a), (1) (b), or (1) (c) of this section upon a determination by the court that there are no private or other public funds available for the care, custody and maintenance of a child, the court may order a reasonable sum for the care, custody and maintenance of the child to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the child without such payment; or

(2) The court may commit such child to the care and custody of the Department of Public Institutions.

43-210.01. Child in need of special supervision; orders permitted; commitment to Department of Public Institutions, when. When any child is found by the court to be a child in need of special supervision as defined by subdivision (5) of section 43-201, the court may enter such order as it is empowered to enter in the case of a delinquent child except that no such child shall be committed to the Department of Public Institutions until the court shall find:

(1) That said child has failed to make a satisfactory adjustment after a reasonable period of time under its original order; or

(2) Such commitment is necessary in the first instance for the protection of the health and welfare of said child or of society.

43-210.02. Juvenile court; commitment of children subject to act; hospital treatment; custody in state institu-

tions; discharge. The court may, when the health or condition of any child within the terms of this act shall require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in an accredited and suitable private hospital or institution which will receive it for like purposes. If the court finds any such child to be feeble-minded as defined by section 83-219, it may, upon attaching the physician's certificate and the report as to the mental capacity provided by section 83-221, commit said child directly to the Beatrice State Home.

In no case shall a child committed under the terms of sections 43-201 and 43-202, sections 43-204 to 43-220, and sections 43-210.01 to 43-210.03 be confined after he or she shall have reached the age of twenty-one years. The marriage of any child committed to a state institution under the age of twenty-one years shall not make such child of the age of majority. A child committed to any such institution shall be subject to the control of the superintendent thereof, and the said superintendent, with the advice and consent of the Department of Public Welfare or the Department of Public Institutions, whichever has supervision of the institution, shall adopt by-laws for the promotion, paroling and final discharge of inmates such as shall be considered mutually beneficial for the institution and the inmates; *Provided*, upon final discharge of any inmate such department shall file a certified copy of the discharge with the court which committed said inmate.

43-212. Children under fourteen charged with crime; custody; detention; prohibitions; children under sixteen; detention; prohibitions. When a child under fourteen years of age is taken into custody the court or magistrate may place such child in the care of the sheriff, police officer or probation officer or other suitable person as the court or magistrate shall direct, who shall keep such child in some suitable place outside of the enclosure of any jail or police station. When any child under the age of sixteen years shall be detained in any institution to which adults

are sentenced, it shall be unlawful to permit such child to have verbal, visual, or physical contact with such adults at any time.

43-213. Neglected, dependent or delinquent children; confinement; parole; Director of Public Institutions; duties; Parole and Group Home Unit; created. It shall be the duty of the Director of Public Institutions to maintain an agent of the Department of Public Institutions, whose duty it shall be to examine the homes of children paroled from institutions under its jurisdiction, for the purpose of ascertaining and reporting to the department whether they are suitable homes, to assist children paroled or discharged from such institutions or placed in foster or group homes in finding suitable employment, and to maintain a friendly supervision over paroled inmates during the continuance of their paroles. To administer the provisions of sections 43-213, 83-108.04, 83-465 and 83-487, the Director of Public Institutions shall appoint a supervisor of the Parole and Group Home Unit, which is hereby created, and such other parole officers as are necessary to carry out the purposes of sections 43-213, 83-108.04, 83-465 and 83-487.

43-218. Act, how construed. This act shall be liberally construed to the end that its purpose may be carried out, namely, that the care, custody and discipline of a dependent, neglegected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all vases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise.

SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 15

CLARENCE DEBACKER,

Appellant,

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

Appeal to the Supreme Court of Nebraska

Brief for the People of the State of California, Amicus Curiae in Support of Appellee

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In the
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OCTOBER TERM, 1968

No. 662

CLARENCE DEBACKER;

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Appellee.

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Brief for the People of the State of California, Amicus Curiae in Support of Appellee

INTEREST OF AMICUS CURIAE

The interest of the People of the State of California is in two of the three questions presented in the Jurisdictional Statement and the Brief for Appellant, which read as follows:

> 1. "Whether provision of Nebraska Juvenile Court Act denying trial by jury in juvenile court for offense which would be triable by a jury if committed by an adult violates juvenile's Sixth Amendment rights in light of this Court's decisions in *In re* Gault, 387 U.S. 1 [(1967)]; *Duncan v. Louisiana*, 391 U.S. 145 [(1968)]; and *Bloom v. Illinois*, 391 U.S. 194 [(1968)].

2. "Whether, in light of *Gault*, statute providing for proof by preponderance in delinquency proceeding, based on misconduct which would be felony if charged criminally, is invalid under Fourteenth Amendment."

The People of California have no interest in the third question which relates to the constitutionality of the procedure of the Nebraska statute by which the prosecutor has the sole discretion as to whether he will proceed in juvenile court or in criminal court. Under California law, the jurisdiction of the Juvenile Court is exclusive for children under 16 (Calif. Welf. & Inst. Code §§ 601(a), 707); it is initially exclusive for children between 16 and 18, with transfer to the criminal courts in the discretion of the judge pursuant to statutory procedures (Calif. Welf. & Inst. Code §§ 601(a), 707); and it is concurrent for minors between 18 and 21 (Calif. Welf. & Inst. Code §§ 607(2), 607(b)). In the latter case, although the county probation officer or district attorney may have initial discretion in selecting the court, the final determination is the responsibility of the juvenile court judge or the criminal court judge (Calif. Welf. & Inst. Code §§ 607(b), 707).

We do, however, have a substantial interest in the first two questions. Similar to the Nebraska statutes here involved, the California Juvenile Court Law[1] does not provide for a jury trial, and with some differences from the Nebraska Statute, provides that a preponderance of the evidence must be adduced to support a finding that the minor is a person within the jurisdiction of the Juvenile Court.

[1] Calif. Welf. & Inst. Code §§ 501 et seq. See also Welf. & Inst. Code §§ 1000 et seq. (Immigration and Delinquency).

California Welfare and Institutions Code Section 701 provides that the judge must first conduct a hearing to determine whether the minor (a person under 21) is a person described by sections 600, 601 or 602 of the Welfare and Institutions Code, and

> "for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of the evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601."

If the court makes a finding that the minor comes within its jurisdiction, it then conducts a dispositional hearing (Welf. & Inst. Code §§ 702, 706). The court has various alternatives in treating the minor, some of which are dependent on the section giving rise to jurisdiction. See Calif. Welf. & Inst. Code §§ 725, 726, 727, 730, 731.

Among the alternatives for minors coming within section 601 and for those within section 602 if further proceedings, including a hearing, have been taken, is committment to the California Youth Authority (Welf. & Inst. Code §§ 730, 731, 1731) which has jurisdiction over educational train-

ing and treatment institutions maintained as correctional schools. See Welf. & Inst. Code § 1000. The court may also utilize the resources of the Department of Mental Hygiene, the Youth Authority, and public or private agencies or doctors for diagnostic medical, or psychiatric services, treatment or recommendations. See Calif. Welf. & Inst. Code §§ 703, 704, 705, 739, 740, 741. In any case, the commitment or disposition made by the juvenile court may be reviewed and modified at any time. See Welf. & Inst. Code §§ 729, 775-779.

The California Juvenile Court Law establishes a comprehensive and carefully planned system for the rehabilitation, treatment, and when necessary, for the incarceration of minors found to need such care after careful and complete adjudicatory and dispositional hearings. We believe that the standards of proof established by the legislature and the provision for hearing by a juvenile court judge rather than a jury fully protect the child's right to due process in such proceedings.

We appear before this Court as amicus curiae to uphold the validity of legislative standards established as part of comprehensive proceedings, which are neither criminal nor civil, but *sui generis*, designed to deal with the problems of juvenile delinquency, potential delinquency and neglect in a rational and humane manner.

SUMMARY OF ARGUMENT

It is established by statute, in California as in Nebraska, that in juvenile proceedings, the judge, rather than a jury, is the trier of fact, and the allegations on which jurisdiction is based may be proved by a preponderance of the evidence. It is the position of the People of the State of California that there is no violation of due process or equal protection

in this state legislative determination, whether or not the proceedings are concerned with conduct which is proscribed by the criminal law.

Juvenile proceedings should not be rigidly classified as either civil or criminal in nature; they are unique proceedings designed to deal with complex problems and for which the legislature may prescribe appropriate procedures. In *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967), this Court held that classification of juvenile proceedings as "civil" could not justify procedure which did not afford due process. Although appellant asserts that *Gault* held juvenile proceedings to be "criminal," requiring the application of all the procedures of a criminal trial, this Court was careful to adhere to the view expressed in *Kent* that a juvenile hearing need not conform with all the procedures of a criminal trial. We are in accord with this Court's flexible approach, and urge that it makes little sense to turn the rejection of a civil label into a mandate to impose rigid criminal procedures on proceedings which remain non-criminal in concept and function.

Juvenile proceedings are a unique response to a problem which, while similar in some aspects to the problems of the criminal law, involves areas of solely juvenile concern. Any due process theory in this field must take account of the qualitative differences of juvenile law. Such an approach by this Court, and the adoption of standards which make the qualitative differences determinative, would provide incentive for more functionally valid juvenile law.

California, like Nebraska, has established a comprehensive statutory scheme for dealing with juvenile problems. The non-criminal nature of these proceedings is unequivocally stated by both legislature and courts. Under this law, the Juvenile Court judge has a wide range of dispositional alternatives to serve the legislative goal of rehabilitation.

In California, one of these alternatives is commitment to the Youth Authority, an administrative agency with jurisdiction over training institutions maintained as correctional schools. The Youth Authority may parole or discharge the minor before majority, and the committing court may review and modify the commitment at any time. Any such commitment is based not on the conduct found but on full review of background and problems. Such proceedings have some apparent similarity to proceedings for narcotics and other "civil" commitments in which this Court has not required all the procedures of a criminal trial.

While the character of juvenile proceedings does not justify fundamental unfairness, it does justify judicial deference to legislative judgment. The legislatively established procedures at issue here do not violate due process.

Neither trial by jury nor proof beyond a reasonable doubt is constitutionally required as essential to due process in a juvenile case. In California, the procedures at issue were established after extensive conscientious review and evaluation. Reasoned analysis supports the legislative judgment.

Both the Governor's Special Study Commission in California, and the President's Task Force on Juvenile Delinquency have observed that it is a generally held view that jury trial is incompatible with the objectives of the juvenile law. There is much to support the judgment that trial by jury is not crucial to a system of juvenile justice. While courts and commentators are in some disagreement, the better reasoned opinions, in our view, follow this judgment. "The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function. . . ." *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9, 17 (1967).

Appellant's argument that *Duncan v. Louisiana,* 391 U.S. 145 (1968) and *Bloom v. Illinois,* 391 U.S. 194 (1968) have foreclosed further inquiry is both simplistic and circular. Moreover, it fails to take into account that rigid application of *Duncan and Bloom* does not fit the realities of the juvenile court system where incarceration may be possible for conduct not giving rise to a right to jury trial for adults or for conduct which does not involve crime at all and for which juries would be entirely inappropriate.

Finally his argument overlooks the problem of waiver. To apply the criminal standard is to force on a number of children incapable of waiving a "benefit" which is usually rejected when offered. To permit another standard of waiver is to recognize that the difference in the proceedings justifies deviance from the criminal model.

The Governor's Special Commission in California also recommended and the legislature adopted the preponderance of the evidence test as the standard of proof in juvenile cases. The commission found no valid reason for requiring the degree of proof customary in criminal cases, believing that the standard of preponderance of the evidence sufficiently safeguarded the rights of the minor. The California Supreme Court recently considered this requirement in the light of this Court's decision in *In re Gault,* and found no denial of due process. We call to the attention of this Court this carefully considered and perceptive opinion. *In re Dennis M.,* 70 A.C. 460, 75 Cal.Rptr. 1, 450 P.2d 296 (1969).

While reasonable men may differ as to the appropriate standard, we urge this Court to defer to the legislative judgments of the several states and permit re-evaluation and evolution to continue in this area without unnecessary constitutional rigidity.

In a juvenile case, the risk of failing to act may be greater than the risk of acting too quickly. We submit that it is no violation of due process to defer to the legislative judgment as to which risk is greater.

ARGUMENT

A LEGISLATIVE DECISION THAT A JUDGE RATHER THAN A JURY SHALL BE THE FINDER OF FACT AND THAT THE ALLEGATIONS MAY BE PROVED BY A PREPONDERANCE OF THE EVIDENCE IN A JUVENILE PROCEEDING, WHETHER OR NOT THE ADJUDICATION IS CONCERNED WITH CONDUCT WHICH VIOLATES THE CRIMINAL LAW, DOES NOT DENY THE JUVENILE EITHER DUE PROCESS OR EQUAL PROTECTION.

A. Juvenile Court proceedings are neither "criminal" nor "civil" but are unique proceedings for which the legislature may prescribe procedures appropriate to the special problems involved.

Appellant argues that this Court in *In re Gault,* 387 U.S. 1 (1967), made it clear that "a juvenile delinquency proceeding leading to incarceration is a criminal case." (Appellant's Brief at 14.) Thus, the argument continues, all of the procedures of a criminal trial must be followed in juvenile court proceedings. We disagree.

In *Kent v. United States,* 383 U.S. 541 (1966), and *In re Gault, supra,* this Court established the principle that a juvenile, no less than an adult, is entitled to due process in any proceeding which may result in the denial of substantial benefits or in his incarceration for a significant period of time. In *Kent,* interpreting the District of Columbia Juvenile Court Act "in the context of constitutional principles," this Court held that the exercise of the Juvenile Court's discretion to waive its exclusive jurisdiction was so "critically important" to the minor that he "was entitled to a hearing, including access by his counsel to

the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." *Id.* at 577. The reason this waiver of jurisdiction was so critically important was because of the special rights and immunities conferred on the minor by statute:

> "He . . . is shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The Court is admonished by the statute to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection of the public cannot be adequately safeguarded without . . . removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." *Id.* at 556-57.

Although basing its decision on the benefits conferred, the court in *Kent* expressed some misgivings about the actual performance of Juvenile Courts, and raised doubts as to whether this performance "measured well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties available to adults." *Id.* at 555.

In *Gault,* this Court reached some of the questions raised but not answered in *Kent,* and held generally that procedural due process could not be denied a juvenile merely by classifying juvenile court proceedings as "civil" in nature. This Court went on to hold that certain procedural protections were essential requirements of due process in an adjudication hearing which could result in the incarceration of the juvenile: Notice, right to counsel, right to confront witnesses, and right against compelled self-incrimination.

The doubt expressed in *Kent* as to the performance of the juvenile court system was expressed in stronger terms in *Gault*. Where the emphasis in *Kent* was on the benefits of the juvenile court system which were taken from the child without "due process," the emphasis in *Gault* appeared to shift to the deficiencies of the juvenile court system. "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case." *Id.* at 29.[3] Even so, this Court reiterated the view put forth in *Kent, supra* at 562, that all the requirements of a criminal trial are not included in the due process required for juvenile proceedings:

> "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'" *In re Gault, supra* at 30.

Thus, contrary to appellant's assertion, *Gault* and *Kent* held not that all criminal procedure is applicable to juvenile court proceedings but rather that due process requires a fair adjudication procedure and that this requirement cannot be evaded by a label. We are fully in accord with this flexible approach; even the basic non-criminal character

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3. The apparent shift in emphasis may perhaps be explained by the fact that Gerald Gault was "incarcerated" in a state "industrial school" for the remaining five years of his minority, while the adult criminal would have been fined up to $50 or imprisoned in jail for up to two months. Morris Kent, on the other hand, was sentenced in regular criminal proceedings (with the full panoply of due process protection) to from 30 to 90 years in prison. Had he been treated as a juvenile, his "incarceration" would have terminated at majority, again a period of five years. For a perceptive discussion of the basically inconsistent approach of these cases, see Welch, *Kent v. United States* and *In re Gault: Two Decisions in Search of a Theory*, 19 Hastings L. J. 29 (1967).

of juvenile proceedings does not justify arbitrariness or a denial of fundamental fairness. At the same time, it makes little sense to turn this Court's rejection of the "civil" classification into a mandate to impose a criminal label, and thus procedure, on proceedings which remain different in function, essentially non-criminal in concept and approach, and which are designed to deal with individuals who have problems, potential, and a commitment from society significantly different from adults.[4]

Juvenile proceedings are a unique response to a problem which is exceedingly complex and, while related in some aspects to the problems of the criminal law, covers areas of concern solely related to juveniles such as neglect, truancy, and incorrigibility. It has been pointed out that the question of the state's concern for and jurisdiction over children must be answered, not by the criminal law, but by a due process theory that takes account of the qualitative differences of juvenile law from both criminal and civil proceedings.

> "It is submitted that the Court's decision in *Gault* has left latitude for making such a distinctive constitutional determination in a 'truly noncriminal' context." Welch, *op. cit. supra* Note 3, at 38.
>
> "If criminal law procedure importation were to proceed apace from the *Gault* decision in total disregard of any constitutional effect for the special rights and immunities of juvenile law, as Justice Harlan predicts, it seems inevitable that 'rigid procedural requirements may inadvertently . . . [serve] to discourage . . . efforts to find more satisfactory solutions for the problems of juvenile crime . . . and development of

4. The history and philosophy of the Juvenile Court system were reviewed in *Gault* and *Kent*. See also, The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report:* Juvenile Delinquency and Youth Crime 2-7 (1967).

> the systems of juvenile courts.[5] Were the Supreme Court to adopt standards for the measurement of juvenile court due process which make qualitative differences in the effects of a delinquency determination and special treatment essential ingredients, it would insure a potent incentive for a more physically and functionally valid juvenile law system. As it is, the pressure to be very different from the criminal system as lessened proportionately to the degree of 'essential' procedural identity between the two systems." *Id.* at 39.

California, like Nebraska, has established a statutory system for dealing with the problems posed by juvenile crime, potential crime, various unique juvenile problems and neglect or need. The non-criminal nature of juvenile court proceedings is unequivocally stated in section 503 of the California Welfare and Institutions Code:

> "An order adjudging a minor to be a ward of juvenile court shall not be deemed a conviction of crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."

The California courts have consistently reiterated the view that juvenile proceedings are not criminal in nature but are proceedings in which the state seeks to relieve the minor of criminal responsibility and give him direction and rehabilitation. See, *e.g., People v. Dotson,* 46 Cal.2d 891, 895, 299 P.2d 875 (1956); *In re Castro,* 243 Cal.App.2d 402, 406-07, 52 Cal.Rptr. 469 (1966).

Under the California Juvenile Court Law, the court has a wide range of dispositional alternatives to serve these goals whether the child is neglected (§ 600), potentially delinquent (§ 601) or has committed acts which are adult crimes (§ 602). If the minor comes within section 602 of

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5 Footnote omitted; quotation from *In re Gault* at 77.

the Welfare and Institutions Code or if he is within section 601 and further proceedings have been undertaken, one of the alternatives available to the court is commitment to the California Youth Authority. See Welf. & Inst. Code §§ 730, 731, 777.[6] The California Youth Authority is an administrative agency with jurisdiction over educational training and treatment institutions maintained as correctional schools.

> "The Authority shall have charge of the persons committed or confined in each such institution, and shall provide for their care, supervision, education, training, employment, discipline, and government. It shall exercise its powers toward the correction of their faults, the development of their character, and the promotion of their welfare." Calif. Welf. & Inst. Code § 1004.

Commitment to the Youth Authority does not necessarily mean "incarceration" until majority. The Youth Authority may parole the minors under its charge, and may grant "honorable discharge" or leave of absence. Calif. Welf. & Inst. Code §§ 1176-79. Where a minor proves to be so incorrigible or so incapable of rehabilitation as to render his retention detrimental, the minor may be returned to court, where if over 16, he may be certified to the adult criminal court for criminal trial with all constitutional protections. Calif. Welf. & Inst. Code §§ 780, 707. While commitment is a dispositional alternative, the court has available all those dispositions available for both neglected or potentially delinquent children, including probation with

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6. In 1958, Youth Authority commitments on initial petitions were made in 2.2% of Juvenile Court cases. Report of the Governor's Commission on Juvenile Justice, Part 2, at 19. We are informed by the Bureau of Criminal Statistics that similar commitments were made in about 1.3% of the cases in 1967, the most recent year for which such statistics are presently available.

or without wardship, placement with an individual or agency for custody and care, or placement in a juvenile home, ranch or camp. Calif. Welf. & Inst. Code §§ 725-30. The court also may order medical diagnostic or psychiatric services utilizing both public and private facilities. Calif. Welf. & Inst. Code §§ 703, 704, 705, 739-41.

Finally, the court may review and modify the commitment or disposition at any time. Calif. Welf. & Inst. Code §§ 729, 775-79. It should be noted that commitment to a juvenile home or to the Youth Authority for placement in a correctional school is not limited to cases where a "crime" is charged as the basis for juvenile court jurisdiction, nor is commitment to the Youth Authority required even if jurisdiction is based on an act which would be a felony if committed by an adult. The disposition of the child is based on a full review of his background and problems including the specific behavior on which jurisdiction is based. Disposition is not designed to punish the child for this behavior; the proceedings of the juvenile court are essentially remedial. *In re Dennis M.*, 70 A.C. 460, 473, 75 Cal.Rptr. 1, 8, 450 P.2d 296, 303 (1969).

As pointed out by the Supreme Court of California, juvenile proceedings so characterized have some apparent similarities to proceedings for the involuntary commitment of mentally ill persons and narcotics addicts. *In re Dennis M., supra,* at 473, n. 11. This Court, while demanding that due process be accorded as a constitutional requirement in such special proceedings, has not required all the procedures of a criminal trial even though loss of liberty is not just a possibility but an inevitable result. See *Specht v. Patterson,* 386 U.S. 605 (1967); *Minnesota v. Probate Court,* 309 U.S. 270 (1940). Compare *In re Raner,* 59 Cal.2d 635, 381 P.2d 638, 30 Cal.Rptr. 814 (1963).

Appellant urges that a juvenile proceeding is a criminal case because it is based on volitional conduct, as "distinguished from conduct which is the product of mental disease or deficiency, or a status, such as dependency, alcoholism or being the victim of disease or contagion." (Appellant's Brief at 9). Appellant, we submit, has overlooked the entire rationale of these special juvenile proceedings—the juvenile is to be trained and rehabilitated, not punished. His behavior is a product of his immaturity, and his delinquency may be caused or aggravated by factors over which he has little or no control. In short, he is not being punished for his conduct; his conduct is symptomatic of a problem of growth and development which may be amenable to treatment, even where he must be incarcerated for the protection of himself or of society.

> "It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'well-nigh' conclusive. *Berman v. Parker,* 348 U.S. 26, 32 [1964]." *In re Gault, supra,* at 70 (Harlan, J., concurring and dissenting).

The fundamental issue is, of course, to what extent this deference is given where constitutional issues of procedural protection are involved. While the basic non-criminal character of juvenile proceedings does not justify arbitrariness or a denial of fundamental fairness, we urge that it does justify judicial deference to legislative judgment which establishes the procedures at issue here as part of a detailed statutory scheme enacted specifically to provide fundamental fairness in proceedings undertaken in the child's best interests.

B. Neither trial by jury nor proof beyond a reasonable doubt is constitutionally required as essential to due process in a juvenile case.

The California Juvenile Court Law was extensively revised in 1961 as a result of recommendations made by the Governor's Special Study Commission on Juvenile Justice in the course of a study of all phases of Juvenile Justice in California. The recommendations made were the "product of an extensive conscientious process of review and re-evaluation in which numerous local juvenile and judicial officials throughout the state actively participated." Report of the Governor's Special Commission on Juvenile Justice, Part I, at 10. The procedural scheme recommended by the commission and accepted by the legislature did not provide for jury trial and established the degree of proof required as a preponderance of the evidence. Despite significant changes subsequent to *Gault*, these particular procedural requirements have remained unchanged.[7] Setting aside appellant's argument that *Gault* is necessarily a mandate to impose a rigid criminal label and procedure on juvenile proceedings, we submit that reasoned analysis supports the legislative judgment on both issues.

1. JURY TRIAL

In its 1961 study, the California Commission commented on jury trial in juvenile cases:

> "The generally held view, shared by the commission and all of California's juvenile court judges, is that the jury system is incompatible with the philosophy

7. As pointed out by the California Supreme Court in *In re Dennis M.* at 469, the California legislature has been fully responsive to *Gault* by adopting numerous amendments designed to implement *Gault*. See Calif. Stats. 1967, ch. 507, 1355, 1356.

of the juvenile court law." Report of the Governor's Special Study Commission on Juvenile Justice, Part II, at 19.

A survey of 25 judges in the largest California counties revealed all were opposed to such trials, their comments suggesting that jury trials would be in conflict with juvenile court philosophy and would destroy the protective purpose of the court. It was noted that the publicity attracted would go far to eliminate the confidentiality necessary for effectiveness. *Ibid.*

To similar effect is the discussion by the President's Task Force on Juvenile Delinquency in 1967:

> "Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.
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> "As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge.' The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties. Moreover, the presence of a jury affects the whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which

typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect and emotion rather than a more businesslike presentation.

"A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.,* incorrigibility, need for care and supervision, truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

"As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. 'This too might be lost, and justice still be done.'" The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime,* at 38 (1967).

The courts and commentators which have considered the issue have disagreed on its resolution, with the better reasoned opinions, in our view, taking the position that a jury

trial is not an essential part of due process in a juvenile proceeding.[8]

This issue was analyzed at length in *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9 (1967). The Pennsylvania appellate court reached the conclusion that jury trial is not a requirement of due process in juvenile proceedings.

> "In short, those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a balance by injecting procedural orderliness into the juvenile court system. . . . It has not suggested that we discard the flexibility which has long been the hallmark of juvenile courts, but that we temper it with certain procedural safeguards." 234 A.2d at 15-16.

The court viewed *Gault* as an

> "invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds." *Id.* at 16.

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8. *Compare Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968); *Shone v. State*, 237 A.2d 412 (Maine 1968); *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508, 519 (1968) (minority opinion); *Estes v. Superior Court*, 438 P.2d 205 (Wash. 1968); *In re Agler*, 15 Ohio App.2d 240 (1968); and *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9 (1968) *with Nieves v. United States*, 280 F.Supp. 994 (S.D.N.Y. 1968); and *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968). See also, *In re Dennis M.*, 70 A.C. 460, 471-72 (1969) (by implication—jury trial not required). Commentators are similarly divided. *Compare* Welch, *op. cit. supra;* Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 559 (1957) *with* Anticau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 399-400 (1961); Dorsen & Rezneck, *Gault and Juvenile Law*, 1 Family Law Q. No. 4; 1, 22-23 (1967). See generally, Annot. 100 A.L.R.2d 1241 (1968). As appellant points out, the majority of jurisdictions do not provide for jury trial in juvenile cases. Appellant's Brief at 12-13, n. 7, 8.

The court reviewed the responsibilities of the juvenile court judge, finding, in essence, that he must be more than a trier of fact.

> "[H]e must, in a unique manner, establish a relationship that will permanently alter the behavior patterns of the child." *Id.* at 17.

The insertion of jury trials would sorely limit the juvenile court judge in carrying out his special tasks. *Ibid.*

> "[W]e find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children." *Ibid.*

Johnson was decided before this Court's decision in *Duncan v. Louisiana,* 391 U.S. 145 (1968), made the right to jury trial an element of due process applied to state criminal trials. The highest court of Kentucky considered the effect of *Duncan,* but nonetheless followed the Pennsylvania court in *Johnson.* In *Dryden v. Commonwealth,* 435 S.W. 2d 457 (Ky. 1968), the court was unwilling to equate a juvenile proceeding with a criminal trial even though the basis might be conduct which would be a crime if committed by an adult. The court noted that if institutionalization may be the result, "it can make no sensible difference whether he is charged with having committed a criminal offense, of truancy, of habitual disobedience to his parents, or of being dependent, neglected, needy or abandoned." *Id.* at 461. The court continued:

> "A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were. In our opinion there is more to be lost than gained. Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge." *Ibid.*

Appellant, however, by the simple expedient of labeling a juvenile proceeding a criminal trial, argues that this court's decision in *Duncan v. Louisiana, supra,* and in *Bloom v. Illinois,* 391 U.S. 194 (1968), "have so completely mooted the arguments, pro and con, that no further explication is necessary." Appellant's Brief at 19. We submit that such an approach is not only simplistic but circular. Our inquiry is whether, despite legislative judgment to the contrary, due process requires a jury trial in juvenile proceedings, which may or may not involve "criminal" conduct; may or may not result in incarceration; and do not involve "crime in the ordinary sense; . . . a public wrong which is punishable by fine or imprisonment or both." *Bloom v. Illinois, supra,* at 201.

Moreover, appellant's argument fails to take into account the fact that a rigid application of *Duncan and Bloom* simply does not fit the realities of the juvenile court system. He argues that jury trial should be provided for in the juvenile court whenever a child is charged with a "crime" which for an adult gives rise to a right to jury trial. *Duncan and Bloom* establish this right for "serious crimes," apparently those with possible sentences of greater than six months. In juvenile cases, commitment for a potentially longer period may be ordered in cases where an adult would not be entitled to a jury trial and in cases not involving crimes at all.

If the right to jury trial is based on the potential commitment, then we must ask juries to find juveniles "guilty" of conduct which is not crime, and which is not subject to precise definition. As pointed out by the President's Task Force on Juvenile Delinquency as quoted, *supra*.

> "Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms."

In the statutory scheme established in California, when commitment is ordered, it is not determined by the conduct charged, but on the basis of factors developed in the dispositional hearing. The conduct serves only to give the court jurisdiction to proceed. This is the truly important distinction between adult and juvenile cases.[9]

> "The fact of exposure to incarceration at all, a qualitative consideration, seems, in light of the fourteenth amendment's specific concern for preserving individual liberty, to be an appropriate basis for prescribing procedural safeguards aimed at ensuring the reliability of determinations that state intervention is warranted. The right to counsel, reliable evidence, standard of proof, cross-examination, and transcript of record all relate to reliability. Other procedural aspects of criminal prosecution, such as probable cause for apprehension, the right to bail, the right to trial by jury, the privilege against self-incrimination and exclusionary rules for evidence obtained by trespassory searches and seizures, should not be applied verbatim to juvenile proceedings without due consideration of qualitative differences in incarceration and other differences in juvenile law.

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9. It was apparently the "tokenism" of this dispositional hearing that concerned this Court in *Gault:* "The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society

> "Rather than holding that qualitative aspects of incarceration are 'of no constitutional consequence' and that other statutory 'rights and immunities' afforded the juvenile are 'in no way involved,' the cause of juvenile correction would be better served by a holding that made these 'differences' essential to the constitutionality of carefully tailored 'noncriminal' procedures, while insisting upon the realization of these differences *in fact* in individual cases through appropriate review by appeal and habeas corpus." Welch, op. cit. *supra,* at 35.

Appellant further argues that "lurking just beneath the surface of all arguments that juveniles must not have juries, is the fear that, in some cases, a jury might acquit a juvenile and thus spare him from the benevolent rehabilitation techniques of the state." Appellant's Brief at 17.

While it is possible to argue that one rationale for jury trials in criminal cases is the ability of the jury to ignore the letter of the law and return a verdict based on other considerations, this rationale, even if valid, is completely inappropriate to juvenile cases where the primary objective is to help the child. It may be a "victory" for an adult charged with crime to be relieved of punishment because it is too severe, or because the underlying reasons for his behavior elicit sympathy. It can hardly be considered a victory for anyone, least of all for the juvenile, if a jury irrationally "acquits" a juvenile whose behavior shows he needs help. See Paulsen, *Kent v. United States:* The Constitutional Context of Juvenile Cases, 1966 Supreme Court Review 167, 189 (1966).

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unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility the boy could be disciplined and dealt with at home, despite his previous transgressions. (Footnotes omitted.) *Id.* at 28.

Finally, appellant ignores the problem of waiver which would result from the wholesale importation of criminal law procedures into the juvenile court system, particularly where the "right" in question is of highly debatable benefit or utility. The obvious problems of waiver by a juvenile have been recognized. See, *e.g., In re Gault, supra,* at 55; Comment, *The Juvenile Court Revolution in Washington,* 44 Wash. L. Rev. 421, 432-33 (1969). It has been stated that there are two issues involved: (1) What is the standard for an effective waiver; and (2) who has the authority to waive the juvenile's rights. *Ibid.*

If a juvenile court proceeding is a criminal trial, and the adult "protections" are to apply to the juvenile in full force, then he must have a jury trial as a constitutional right unless he has knowingly and intelligently waived it. *Cf., In re Gault, supra,* at 42. If anyone but the juvenile is able to waive this right, then we are applying a different standard to juveniles, impossible under the rationale that the differences in juvenile court proceedings do not justify deviation from the criminal law model. Thus, there will be some juveniles who will be incapable of waiving.

Yet, even in the sizable number of jurisdictions which provide by statute for a jury trial, the "right" is rarely exercised; most juveniles, or their parents or counsel, choose the informality, privacy, and expertize of a court proceeding. See Paulsen, *op. cit. supra,* at 186; *Peyton v. Nord, supra,* at 726. Thus, the unconscionable result of establishing the criminal jury trial as a constitutional right in a juvenile proceeding is to force the child incapable of waiving to participate in a jury trial which most legislatures have weighed and found wanting, and which those

children capable of making an intelligent choice or their representatives nearly invariably reject.[10]

To answer that the problem does not exist because parent or counsel may waive the right is inevitably to recognize that the difference in proceedings concerning juveniles justifies different standards than those applied to adults. If this is so, then we fail to see why these same differences do not justify judicial deference to the legislative "waiver" made for all juveniles on the basis that their interests are not best served by a jury trial.

2. STANDARD OF PROOF

As part of the general revision of California juvenile law in 1961, the Governor's Commission recommended and the legislature enacted section 701 of the Welfare and Institutions Code which provides in pertinent part that

> "a preponderance of the evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of the evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601."[11]

The Commission's comment on this section reads as follows:

> "The Commission believes these objectives [preserving the guarantee of due process to the minor, and establishing an informal court atmosphere so that po-

10. This should be contrasted with the situation in the adult criminal courts. "The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so." *Gault* at 154. "[T]he fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court." *Id.* at 158.

11. Thus, the section differs somewhat from the Nebraska law which provides for hearings, to a judge, to be conducted in an informal manner "applying the customary rules of evidence in use in civil trials without a jury in the district courts." Nebraska Statutes 43-206.03 (2) (See Appellant's Brief at 43).

tentially harmful effects of the proceedings are minimized and the minor's receptivity to treatment is encouraged] can be attained by applying rules of evidence routinely observed in the trial of any other cause in a court of law *with one important modification,* that such rules are to be applied only to test sufficiency of evidence and not to be applied as rules of admissibility. Thus, any matter relevant and material to the past or present conduct, welfare, or care of the minor, and any matter material and relevant to the acts or circumstances which are alleged to bring him within the court's jurisdiction, should be received in evidence. However, competent evidence, not subject to timely objection by competent counsel, must be adduced to support a finding of wardship.

"All of the reasons for employing rules of evidence in other judicial proceedings, *e.g.,* to insure truthful, reliable, and fair testimony, apply with equal force to a hearing on a minor's delinquency or a hearing in which a child may be removed from his family because of parental neglect.

. . .

"On the other hand, the Commission sees no valid reason for requiring the degree of proof customary in criminal cases. It is our opinion that requiring proof of the jurisdictional facts by a preponderance of evidence will sufficiently safeguard the rights of the minor so long as the court scrupulously observes the presumptions of lawful conduct and circumstance until the allegations are actually proven in open hearing." Report of the Governor's Special Commission on Juvenile Justice, Part I at 30.

This provision of the California Juvenile Court Law establishing the standard of proof was recently considered by the California Supreme Court in light of *Gault. In re Dennis M.,* 70 A.C. 460, 75 Cal.Rptr. 1, 450 P.2d 296 (1969).

In an exhaustive and carefully considered opinion, the California court found no denial of due process in the application in juvenile proceedings of the standard of proof established by the legislature. We have little to add to the perceptive review made by that court. The relevant portion of the opinion is quoted below for the convenience of this Court.[12]

> "We meet at the outset a contention advanced by appellant at oral argument; i.e., that the United States Supreme Court decision in *In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428], compels the state to establish the facts supporting a charge of juvenile delinquency by the criminal standard of proof 'beyond a reasonable doubt.' We do not so read *Gault*. It is true, of course, that the decision inaugurated a sweeping constitutional reform of the rights of juveniles in this country. It drew from the teaching of earlier cases the fundamental proposition that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone' (387 U.S. at p. 13 [18 L.Ed.2d at p. 538] [and laid] down specific guidelines for implementing those guarantees in juvenile proceedings. Yet in so doing the court took repeated pains to limit its holding by warning that 'We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." '(*Ibid.*) First, the decision was intended to affect only the adjudicatory stage of juvenile proceedings, and then only when the outcome may be commitment to a state institution. (*Ibid.*) Secondly, the court made it clear that even if the foregoing conditions are met, the Constitution does not require that the full panoply of rights accorded to an adult accused

12. Footnotes in quoted material are numbered as in original.

of crime be erected in the juvenile court. (*Id.* at pp. 27, 30 [18 L.Ed.2d at pp. 546, 547-548].) Rather, the opinion (at pp. 30-31 [18 L.Ed.2d at pp. 547-548]) adopts for juvenile court adjudications of delinquency the holding of *Kent v. United States* (1966) 383 U.S. 541, 562 [16 L.Ed.2d 84, 98, 86 S.Ct. 1045], that 'the hearing must measure up to the essentials of due process and fair treatment.' Those essentials, as the remainder of the opinion spells out, are (1) adequate notice of the charges, (2) assistance of counsel, (3) opportunity for confrontation and cross-examination, and (4) the privilege against self-incrimination. (387 U.S. at pp. 31-57 [18 L.Ed.2d at pp. 548-563].)

"Not only is standard or quantum of proof missing from the foregoing itemized list, but the court expressly declined to reach this very issue. In the course of its opinion below, the Arizona court had ruled on the question of the appropriate standard of proof in juvenile cases; referring inter alia to that ruling, the United States Supreme Court stated (387 U.S. at pp. 10-11 [18 L.Ed.2d at pp. 536-537]) that 'We emphasize that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution.' And one year later the court again refrained from deciding the issue.[5]

"We infer that at least for the present the Supreme Court has left this matter to the states and the lower federal courts. The results, however, are still highly

5. In *In re Whittington* (1967) 13 Ohio App.2d 11 [42 Ohio Ops.2d 39, 233 N.E.2d 333], a 14-year-old youth had been adjudged a delinquent after a finding on a preponderance of the evidence that he had committed second degree murder. In affirming, the Ohio court rejected a contention that the proof of such conduct must be made beyond a reasonable doubt. The United States Supreme Court granted certiorari and heard oral argument, but ultimately chose not to reach the merits; rather, it vacated the judgment and remanded the case for reconsideration in the light of *Gault*, which had been decided in the interim.

inconclusive. At least three different formulae have been sanctioned. The great weight of authority holds that in juvenile proceedings the general civil standard of proof by a preponderance of the evidence governs. (See cases collected in Note, 43 A.L.R.2d 1128, 1138-1141.) Some courts, including the Arizona Supreme Court in *Gault* itself, have adopted the special civil standard of proof by 'clear and convincing evidence.' (See, *e.g. Application of Gault* (1965) 99 Ariz. 181 [407 P.2d 760, 768].) And the few jurisdictions to consider the issue since *Gault* are divided: in Illinois and Texas it has been held that the criminal standard of proof beyond a reasonable doubt is now constitutionally compelled in juvenile cases (*In re Urbasek* (1967) 38 Ill.2d 535 [232 N.E.2d 716]; *Santana v. State* (Tex. Civ.App. 1968) 431 S.W.2d 558; see also *United States v. Costanzo* (4th Cir. 1968) 395 F.2d 441, 445 [applying the more limited terms of the federal juvenile statute]; *DeBacker v. Brainard* (1968) 183 Neb. 461 [161 N.W. 2d 508, 513] [dissenting opinion by four justices; state constitution requires concurrence of five to hold a statute unconstitutional]), while the District of Columbia Court of Appeals has adhered to its pre-*Gault* adoption of the preponderance of the evidence test (*In re Wylie* (D.C. Mun. App. 1967) 231 A.2d 81, 84).

"In California we do not write upon a clean slate. For the first half-century of their existence our juvenile court statutes contained no provision on this topic, and a wide variety of standards of proof was in actual use.[6] In 1957, however, a special commission was created to survey and evaluate the administration of juvenile justice in this state and submit recommendations for legislative action. After three years of field

6. Many trial judges voluntarily applied rules of evidence in contested cases. But both 'civil rules' and related criminal rules were invoked, and in the latter category approximately one-half of the judges used the reasonable doubt standard and one-half used preponderance of the evidence. (Rep. of Governor's Special Study Com. on Juvenile Justice (1960) pt. II, pp. 9-10.)

studies, hearings, drafts, and conferences with experts and practitioners alike, the commission filed its report. On the important issue of procedural rules, the commission posited that 'The problem in attempting to establish acceptable juvenile court procedures is to attain a working balance between two essential objectives—first, preserving the guarantee of due process to the minor; and second, establishing an informal court atmosphere so that potentially harmful effects of the proceedings are minimized and the minor's receptivity to treatment is encouraged.' (Rep. of Governor's Special Study Com. on Juvenile Justice (1960), pt. I, p. 29.) Mindful of both of these goals, the commission concluded (at p. 30) that 'All of the reasons for employing rules of evidence in other judicial proceedings, *e.g.*, to insure truthful, reliable, and fair testimony, apply with equal force to a hearing on a minor's delinquency or a hearing in which a child may be removed from his family because of parental neglect. . . . On the other hand, the Commission sees no valid reason for requiring the degree of proof customary in criminal cases. It is our opinion that requiring proof of the jurisdictional facts by a preponderance of evidence will sufficiently safeguard the rights of the minor so long as the court scrupulously observes the presumptions of lawful conduct and circumstance until the allegations are actually proven in open hearing.' Accordingly, the commission recommended that the standard of proof in juvenile court matters be a preponderance of the evidence, and the Legislature so provided (Stats. 1961, ch. 1616, p. 3482.)[7]

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7. Now Welfare and Institutions Code section 701, the statute declares in relevant part that "a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601."

"The Legislature, moreover, has been fully responsive to *Gault*. Many of the safeguards required by *Gault* had already been incorporated into our law six years before that decision, as the opinion itself recognizes. (387 U.S. at p. 37 fn. 63 [18 L.Ed.2d at pp. 551-552].) Nevertheless, in its 1967 session the Legislature adopted numerous amendments designed to comply with the entire mandate of *Gault*, by implementing in considerable detail the juvenile's right to notice, to counsel, to confrontation and cross-examination, and his privilege against self-incrimination. (Stats. 1967, chs. 507, 1355, 1356; see generally Gardner, *Gault* and *California* (1968) 19 Hast. L.J. 527, 532-539.)

"Such deliberate acts of the Legislature come before us clothed with a presumption of constitutionality. 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citations.]' (*Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484 [171 P.2d 21, 166 A.L.R. 701]; accord, *State of California v. Industrial Acc. Com.* (1957) 48 Cal.2d 365, 371 [310 P.2d 7]; *In re Davis* (1966) 242 Cal.App.2d 645, 651 [51 Cal.Rptr. 702].) No such showing is here made with regard to the statutory standard of proof in juvenile matters.

"In contrast to a number of the fundamental guarantees of Anglo-American criminal law which can trace their sources back to the Magna Carta or even earlier (*e.g., Duncan v. Louisiana* (1968) 391 U.S. 145 [20 L.Ed.2d 491, 88 S.Ct. 1444] [right to trial by jury]; *Klopfer v. North Carolina* (1967) 386 U.S. 213 [18 L.Ed. 1, 87 S.Ct. 988] [right to speedy trial]), the standard of proof 'beyond a reasonable doubt' is a relatively recent development. It appears to have had its origin at the end of the Eighteenth Century, and

to have first passed through a variety of differing and tentative formulations. (9 Wigmore, Evidence (3d ed. 1940), p. 317.) Although it is now codified in our statutes (Pen. Code § 1096), it is not mentioned in either the California or federal Constitutions. For present purposes, however, we may assume that it is part of the due process of law guaranteed in criminal cases by the Fourteenth Amendment. (See *Speiser v. Randall* (1958) 357 U.S. 513, 525-526 [2 L.Ed.2d 1460, 1472-1473, 78 S.Ct. 1332].) The question remains, does *Gault* require, by implication, that this element of adult criminal trials be incorporated into our juvenile court law?

"Prior to *Gault* it was squarely held that by reason of the fundamental differences in nature and purpose between a criminal prosecution and a juvenile proceeding, the use in the latter of the preponderance of the evidence standard prescribed by Welfare and Institutions Code section 701 does not constitute a violation of either due process or equal protection of the law. (*In re Johnson* (1964) 227 Cal.App.2d 37, 39 [38 Cal.Rptr. 405]; *cf. In re Castro* (1966) 243 Cal. App.2d 402, 408 [52 Cal. Rptr. 469].) Unless those differences have been obliterated by *Gault*, the *Johnson* holding remains the law of this state. (See, *e.g., In re Jones* (1967) 256 Cal.App.2d 240, 243-244 [63 Cal.Rptr. 748] [post-*Gault* appeal from declaration of wardship based on charge of attempted arson; preponderance of the evidence standard applied without discussion].) We do not deny that *Gault* casts doubt on the traditional *parens patriae* theory, and exposes many defects in its practice; but we also take the high court at its word when it reiterates that under the Constitution the juvenile court hearing need not 'conform with all of the requirements of a criminal trial or even of the usual administrative hearing' (387 U.S. at p. 30 [18 L.Ed.2d at p. 548], quoting from *Kent v. United States*

(1966) *supra*, 383 U.S. 541, 562 [16 L.Ed.2d 84, 97].) Indeed, the opinion is replete with language admonishing that the new rules there laid down should not be taken to spell the end of the juvenile court process *per se*, and that many of its unique attributes can and should be preserved.[8]

In a thoughtful decision reviewing the just quoted language of *Gault*, a Pennsylvania appellate court has concluded that 'those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. . . . It has not suggested that we discard the flexibility which has long been the hallmark of

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8. '. . . the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.' (Fn. omitted; 387 U.S. at p. 21 [18 L.Ed.2d at p. 543].)

'We do not mean . . . to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue.' (Fn. omitted; *id.* at pp. 22-23 [18 L.Ed.2d at pp. 543-544].)

'Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce *some* elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, . . .' (Italics added; *id.* at pp. 26-27 [18 L.Ed.2d 545-546].)

juvenile courts, but that we temper it with certain procedural safeguards. . . . [W]e are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through *Gault*, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques." (*Commonwealth v. Johnson* (1967) 211 Pa. Super. 62 [234 A.2d 9, 15-17].)

"The issue before the Pennsylvania court was whether *Gault* required, by implication, that the right to a jury in adult criminal trials be incorporated into juvenile court law. The court held that it did not, reasoning that 'the institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children.' (*Id.* at p. 17; accord, *Dryden v. Commonwealth* (Ky.App. 1968) 435 S.W.2d 457; *In re Fletcher* (1968) ....Md. App..... [248 A.2d 364]; *People v. 3656, 3658,* Y.O. (Sup.Ct. 1968)..... N.Y.S.2d .....)

"Although the consequences of adopting the reasonable doubt standard in juvenile court would perhaps be less drastic than adopting a jury system, to do so would nevertheless introduce a strong tone of crim-

inality into the proceedings. The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. But even after *Gault*, as we have seen, juvenile proceedings retain a *sui generis* character; although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances, factors other than 'moral certainty of guilt' come into play: e.g., the advantages of maintaining a noncriminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code.[9] Thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best intgrests of the youth may well be served by a prompt factual decision at a level short of 'moral certainty.'[10]

9. [Footnote omitted.] [Sets forth Welf. & Inst. Code §§ 600, 601].

10. Even in adult criminal trials, of course, the standard of proof 'beyond a reasonable doubt' applies only to the issue of guilt itself. A variety of lesser standards of proof governs other issues that may arise in the course of such proceedings:

(1) 'Slight' or 'prima facie' showing: proof of corpus delicti (*People v. Amaya* (1952) 40 Cal.2d 70, 76 [251 P.2d 324]).

(2) 'Preponderance of the evidence': territorial jurisdiction of the crime (*People v. Cavanaugh* (1955) 44 Cal.2d 252, 262 [282 P.2d 53]); venue in the proper county (*People v. Megladdery* (1940) 40 Cal.App.2d 748, 764 [106 P.2d 84]); defendant's absence from the state, as tolling the statute of limitations (*People*

"In any event, we cannot say that the Legislature plainly exceeded constitutional limits in finding that the benefits of the reasonable doubt standard would be outweighed by the adverse effects of imposing that doctrine of adult criminal law on the essentially remedial proceedings of the juvenile court.[11]

"Turning to the writings of legal scholars on the question, we find a wide divergence of views. To begin with, in the appellate decisions and statutes of our sister states, as noted above, the weight of authority heavily favors the standard of preponderance of the evidence. Under analogous circumstances, the United States Supreme Court was called upon to decide whether the due process clause was violated by an Oregon statute requiring an accused who pleaded insanity to bear the burden of establishing that defense beyond a reasonable doubt. (*Leland v. Oregon* (1952) 343 U.S. 790 [96 L.Ed. 1302, 72 S.Ct. 1002].) The high court reasoned (at p. 798 [96 L.Ed. at pp. 1308-1309]), 'Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no prac-

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v. McGill (1935) 10 Cal.App.2d 155, 159-160 [51 P.2d 433]); proof of insanity by defendant (*People v. Daugherty* (1953) 40 Cal.2d 876, 901 [256 P.2d 911]); defendant's proof of entrapment (*People v. Valverde* (1966) 246 Cal.App.2d 318, 325 [54 Cal.Rptr. 528]); *cf. Estate of Nelson* (1923) 191 Cal. 280, 286 [216 P. 368] [proof of guilt of a crime, when at issue in a civil case].

(3) 'Preponderance of substantial evidence': proof of other crimes committed by defendant, to show identity through a common *modus operandi* (*People v. Durham* (1969) ante, [70 A.C. 179, 196 fn. 15, 74 Cal.Rptr. 262, 449 P.2d 198]).

(4) 'Clear and convincing evidence': defendant's burden to support a motion to withdraw a guilty plea (*People v. Brotherton* (1966) 239 Cal.App.2d 195, 200 [48 Cal.Rptr. 513]).

11. Thus characterized, their similarity to proceedings for the involuntary commitment of mentally ill persons or narcotic drug addicts becomes readily apparent. In the latter, the possibility of

tical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity. The fact that a practice is followed by a large number of states is not conculusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105 [78 L.Ed. 674, 677, 54 S.Ct. 330, 90 A.L.R. 575] (1934). (Fn. omitted.) The court then concluded (at p. 799 [96 L.Ed. at p. 1309]), 'We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.'

"The draftsmen of model acts have proposed the adoption, at various times, of each of the three standards of proof mentioned herein. In 1959 the United States Children's Bureau took the view that the standard should be preponderance of the evidence. (Comment to § 19 of the Standard Juvenile Court Act (1959) 5 Nat. Prob. & Parole Assn. J. 370.) In 1966, however, in a publication quoted and relied on by the Supreme

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confinement for a substantial period of time likewise requires observance of basic rules of due process (see *In re Raner* (1963) 59 Cal.2d 635 [30 Cal.Rptr. 814, 381 P.2d 638]); yet in an opinion holding the Fourth Amendment and the exclusionary rule applicable to narcotics addiction commitments (*People v. Moore* (1968) 69 A.C. 701 [72 Cal.Rptr. 800, 446 P.2d 800]) we recently rejected a contention that the state must prove the fact of addiction beyond a reasonable doubt rather than by a preponderance of the evidence, observing that such proceedings 'are fundamentally civil in nature' (*id.* at p. 713). The issue, moreover, was purely one of decisional law, there being no legislative directive on standard of proof in the narcotics addiction commitment statutes. (Welf. & Inst. Code, §§ 3000-3305.)

Court throughout its *Gault* opinion (see, e.g., 387 U.S. at p. 38 [18 L.Ed.2d at p. 552], characterizing the work as 'authoritative'), the Children's Bureau recommended the special civil standard of clear and convincing evidence as a 'middle of the road position' or 'reasonable compromise' between the majority civil standard and the minority criminal standard. (Standards for Juvenile and Family Courts (1966), U.S. Dept. of Health, Education and Welfare, Children's Bureau Pub. No. 437, p. 72). In 1968 the Council of Judges of the National Commission on Crime and Delinquency also recommended the clear and convincing evidence standard, observing that an adjudicatory juvenile hearing 'is not bound by the criminal procedure requirement of proof beyond a reasonable doubt.' (Model Rules for Juvenile Courts (proposed final draft, May 1968), rule 26 and comment thereto.) By contrast, the National Conference of Commissioners on Uniform State Laws adopted the Illinois position (*In re Urbasek* (1967) *supra*, 232 N.E.2d 716) in requiring proof beyond a reasonable doubt in delinquency cases, but remained satisfied with the clear and convincing evidence standard in determining neglect or need of treatment. (Uniform Juvenile Court Act (final draft, August 1968), § 29.)

"Similar disarray reigns in the recommendations of the law review writers. Even prior to *Gault*, contrary positions had been taken (compare Paulsen, *Fairness to the Juvenile Offender* (1957) 41 Minn.L.Rev. 547, 562-563 (disapproving reasonable doubt standard), with Antieau, *Constitutional Rights in Juvenile Courts* (1961) 46 Cornell L.Q. 387, 412 (approving reasonable doubt standard)); since *Gault*, the views have proliferated. Some authors call for extension of the reasonable doubt standard to juvenile proceedings (Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law* (1967) 1 Fam. L.Q. 1, 26-27; Comment, *In re Gault and the Persisting Questions of Procedural Due*

Process and Legal Ethics in Juvenile Courts (1968) 47 Neb. L.Rev. 558, 579-580), while others resist such a step (Welch, *Kent v. United States and In re Gault: Two Decisions in Search of a Theory* (1967) 19 Hast. L.J. 29, 36-38, 40-45) and criticize the courts that have taken it (Note (1968) 19 Syracuse L.Rev. 1041, 1046). The majority, however, propose compromise solutions of varying content. (See, *e.g.*, Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal* (1967) 53 Va.L.Rev. 1700, 1713 (a higher standard of proof than preponderance of the evidence, but not reasonable doubt unless right to jury trial is also granted); Lemert, *The Juvenile Court—Quest and Realities, In Task Force Report: Juvenile Delinquency and Youth Crime* (1967), p. 103 (favoring clear and convincing evidence standard, with reasonable doubt standard reserved for 'the most grievous juvenile law violations'); Boches, *Juvenile Justice in California: A re-evaluation* (1967) 19 Hast. L.J. 47, 92-93, 102 (preferring reasonable doubt standard, but 'at least' clear and convincing evidence); Foster, *Notice and 'Fair procedure': Revolution or Simple Revision?, in Gault: What Now for the Juvenile Court?* (Inst. Cont. Legal Ed. 1968), pp. 66-67 (reasonable doubt standard when deprivation of liberty is threatened, preponderance of the evidence in other cases); George, *Gault and the Juvenile Court Revolution* (Inst. Cont. Legal Ed. 1968), pp. 58-59 (reasonable doubt standard in delinquency cases, clear and convincing evidence standard in neglect cases.) If any lesson can be learned from this diversity of proposals, it is that no consensus exists among the scholars to support the proposition that *Gault* requires the use of the reasonable doubt standard in juvenile proceedings.

"In the light of the foregoing analysis, we cannot conclude that the standard of proof provision of Welfare and Institutions Code section 701 (*ante*, fn. 7) is 'clearly, positively and unmistakably' unconstitutional.

(*Lockheed Aircraft Corp. v. Superior Court* (1946) *supra*, 28 Cal.2d 481, 484.) Accordingly, in the absence of a specific ruling on the issue by the United States Supreme Court, we adhere to the pre-*Gault* view of our courts that the established standard is valid and No constitutional rights of the appellant have been infringed by the use of the preponderance of evidence test to determine the truth of the allegation that he had committed a crime." (*In re Johnson* (1964) *supra*, 227 Cal.App.2d 37, 40.)" *In Re Dennis M.*, 71 A.C. at 466-76.

Shortly after the decision in *Dennis M.*, the highest court of the State of New York reached the same conclusion. *In the Matter of Samuel W.*, No. 616, ___ N.Y.2d ___, (1969). As pointed out in *Dennis M.*, both courts and commentators have reached different conclusions as to the standard which should be used. We do not argue that reasonable men cannot differ as to which standard is wisest or best. We do urge this Court to defer to the legislative judgments of the several states, and permit the continued re-evaluation and evolution of the laws dealing with juveniles to proceed without unnecessary constitutional rigidity.

> "[T]he criminal law test should be confined to criminal prosecutions. 'Beyond a reasonable doubt' is a device to prevent punishment in the wrong cases. In a juvenile case the aim is not punishment but rehabilitation; the risk of 'failing to get him' may be greater than the risk of acting too quickly. This is not to say that evidence is not needed, but merely that the consequences of error are not quite so serious in a juvenile case and therefore we need not be quite so cautious." Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 562 (1957).

Moreover, we are dealing in juvenile proceedings with a trained judge. Thus, the differences in formulation of a burden of proof standard may be more apparent than real. While a jury may have to be impressed with the seriousness and burden of fact-finding in a criminal case, the juvenile judge is aware of both the problem and the consequences. Therefore, however the burden of proof is formulated, the court is likely to reach the same proper result. Thus any increased risk of error is extremely small, if it exists at all. We submit that it is no violation of due process to defer to the legislative judgment as to which risk is greater.

CONCLUSION

The problems of treating neglected, potentially delinquent and delinquent children cannot be adequately dealt with by forcing the proceedings into a criminal mold or by making the applicability of the criminal label depend on the potential disposition. Children and their parents are entitled to due process and fair proceedings whenever the state seeks to intervene in their relationship or to institutionalize the child. To recognize this, however, does not and should not compel the imposition of procedures developed to deal with the different problems of adults charged with crimes. Juvenile proceedings, when carefully developed as in California, are *sui generis* and represent considered legislative judgment as to the best way to deal in a rational and humane manner with the complex problems involved. We urge that this Court defer to the legislative judgment so that the system may evolve as necessary to deal with the problem.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 15

CLARENCE DeBACKER, *Appellant*,

v.

HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, *Appellee*.

APPEAL TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLEE

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 662

CLARENCE DeBACKER, *Appellant*,

V.

HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, *Appellee*

APPEAL TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLEE

OPINION BELOW

We accept the Appellant's statement.

JURISDICTION

We accept the Appellant's statement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

We accept the Appellant's statement. Sections 43-201 through 43-220, and Section 25-1933, Reissue Revised Statutes of Nebraska for 1943, are reprinted in Appendix A, *infra*.

QUESTIONS PRESENTED

I

Is the provision of the Nebraska Juvenile Court Act denying juvenile trial by jury in Juvenile Court for an offense which would be triable by a jury if committed by an adult a violation of the Sixth Amendment of the United States Constitution

II

Whether statute providing for proof by a preponderance of evidence in a delinquency proceeding based on conduct which would be a felony if charged criminally violates the Fourteenth Amendment of the United States Constitution

III

Whether the prosecutor's choice of juvenile proceedings or criminal proceedings in a case involving a juvenile violates the Fourteenth Amendment of the United States Constitution

STATEMENT OF THE CASE

We accept Appellant's statement

SUMMARY OF ARGUMENT

I

The purpose of juvenile proceedings is primarily giving aid and guidance to a young person who is in trouble for one of a number of reasons. Juvenile delinquency proceedings which involves a violation of some criminal statute are a part of the juvenile's rehabilitative procedures. The proceedings are informal civil proceedings and a person found to be a delinquent child ad-

determining which case should be taken for the determination of which court it should be filed in.

ARGUMENT

I.

Constitutional Due Process of Law Does Not Require the Intrusion of a Jury Trial in Juvenile Proceedings.

The appellant's "sea of semantic disorder" would hope that a "civil matter" will become a "criminal prosecution" if we label it so often enough and sincerely enough, because, after all, we are better off with "criminal prosecution". An analysis of the juvenile court procedure shows that a juvenile proceeding is in fact and in substance and in form, a civil or at any rate a noncriminal proceeding. The purposes of juvenile proceedings stem basically from the position of the State, under the doctrine of *parens patriae*, but the State of Nebraska, as will later be seen, has carefully followed judicial, as opposed to social, procedures. This concept is recognized in matters of guardianships of minors and in the inability of a minor to contract, except for essentials of life. The logic of the State's position under this doctrine, current maligning of the same notwithstanding, cannot be shaken by such terminology as "big brother" looking after you, and the like. Indeed, at one time we told children "God is watching you." When atheism becomes rampant, we can no longer say, "God is watching you," then we say, "big brother is watching you." This phrase, big brother is watching you, then rides at the conscience of those who still believe in God. Indeed, with no one watching, with no one caring, why should any person be concerned over what they do. The State is the only instrumentality which is in a position to be able to give any meaningful assistance to these individuals, once

the parents and churches have failed. Our juvenile statutes recognize the inability of youth to care for themselves, recognize the immaturity of the young person and the need for additional guidance in correcting them.

As long ago as 1913, the Supreme Court of the State of Nebraska in the case of *State ex rel. Miller* v. *Bryant*, 94 Neb. 754, 144 N. W. 804, in discussing the purposes of a Juvenile Court, stated as follows:

> "* * * * *
>
> "* * *. It may be said that its purpose is to help, not punish, the child. Its functions are largely parental, and it acts in the interests of the child, not adversely thereto. The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help.
>
> "* * * * * *"

The inabilities of our youth are recognized in many other ways. For example, a person in the State of Nebraska must be twenty-one years of age to vote. In Nebraska, a person must be twenty years of age in order to enter into a binding contract for anything other than essentials of life. In Nebraska, a young person must be at least sixteen years old in order to operate a motor vehicle with a driver's license, without some adult being with him. The parental right of discipline extends to any child living in the household of the parent. As of yet, no one has questioned the parents' right to reasonably discipline their children. Parents can, and do, "jail" their children, in that they restrict them to the house and let them out only to attend a school which is operated by a governmental subdivision of the State, or place them in "boarding" or military school.

In Nebraska, as in most states, the State requires that all children between the ages of seven and sixteen attend school when school is in session. The Nebraska statutes also provide that a child under eighteen years of age can be handled in a special way, should he commit a certain set of acts which are criminal in their nature.

Juvenile proceedings in the State of Nebraska, including delinquency, do not carry with it the brand of a conviction of a crime. Section 43-206.03(5), R. R. S. 1943, provides:

> "(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment." (Appendix A, p. 47.)

As a practical matter, if all of the elements of a criminal trial are impressed upon delinquency proceedings, will this proceeding not then be a criminal proceeding?

The immaturity of the young offender is the very reason that he should be handled in a different manner than the criminal adult. The youthful offender is more susceptible of learning that not only certain set of actions are wrong, but at a younger age people are simply more susceptible to learning.

Most people who deal with young people or criminal offenders of any age for that matter, agree that certainty of being caught, followed by some punishment, carries a much higher deterrent effect than an

extremely low possibility of receiving any penalty at all, and having a very severe penalty for some.

One of the most basic ideas in the world is that when a mother tells a child not to touch a hot stove, the child does one of two things. It obeys the mother, or it checks for itself. Idealism would have us believe that all children believe their mother. Practicality tells us that many youngsters burn their fingers when they check the stove. While children are learning, juvenile courts need to be flexible enough to deal with the problems as they come. The juvenile courts cannot be regimented into an IBM machine card and expected to deal adequately with youthful offenders.

In Nebraska a delinquency complaint is tried as a civil trial decided under the District Court rules of civil procedure and provides that the hearing shall be had by the Judge of the court without a jury. Section 43-206.03(2), R. R. S. 1943. (Appendix A, p. 174). The adjudication entered by the Judge is not a "conviction", nor does it impose the usual civil disabilities inherent in a criminal conviction upon the child. The title of the case does not disclose the nature of the case. All cases in juvenile court are entitled "In The Interest Of _____, A Child Under Eighteen Years of Age." Section 43-205, R. R. S. 1943.

The background of the juvenile court law in Nebraska can best be gained by a study of the juvenile system as we now have it, from the cases with reference to juveniles and the inherent authority of courts. The Nebraska Supreme Court in 1950 said in *Application of Reed*, 152 Neb. 819, 43 N. W. 2d 161 at pages 823 and 826:

"* * * *

"* * * The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless * * *. For this, the residence of the child suffices though the domicile be elsewhere * * *

"The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the State suffices even though the domicile may be in another jurisdiction." * * *

"* * * * *"

In the case of *State* v. *Blanco*, 177 Neb. 149, 128 N. W. 2d 615, at page 153, the court discussed the matter of *parens patriae* as a vehicle for the jurisdiction of the state with reference to minors, in the following words in 1964:

"* * * * *

"* * * We do not doubt that the parents or legal custodian of minor children have a constitutional right to guide and control the care, education, religious training, and the other normal attributes of custodial responsibility. But, there is nothing in any of plaintiff's authorities that invades or abridges the power of the state under the doctrine of parens patriae to scrutinize all of the circumstances surrounding the care and upbringing of children and, under applicable rules, to determine where the custody and control of a child shall be. All of the cases cited hereinbefore support and establish this general principle. * * *

"* * * * *"

In the 1959 case of *In re Sanders*, 168 Neb. 458, 96 N. W. 2d 218, the court said at page 462:

* * * * *

"The Juvenile Court Act did not provide a new court. It only imposed additional powers on the district courts of the state. It did not change the rules or procedure of hearings without a jury of issues of fact. Copley v. Godden, *supra*, declares (158 Neb. 246, 63 N. W. 2d 153): 'The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of contested issues of fact in that court.' The duties imposed by the Juvenile Court Act on the district court are judicial. The validity of the act depends on that. The Legislature may not delegate to the courts the performance of non-judicial duties. Art. II section 1, Constitution of Nebraska; Searle vs. Yensen, 118 Neb. 335, 226 N. W. 464, 69 A. L. R. 257; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397; Laverty v. Cochran, 132 Neb. 118, 271 N. W. 351."

* * * * * * (Parenthetical phrase supplied.)

In the recent case decided in 1966 of *In re McCauley*, 178 Neb. 412, 133 N. W. 2d 921, the court discussed the matter of the obligation of the state with reference to the Juvenile Court Act, at pages 417 and 418 in the following words:

* * * * *

"* * * When we are dealing with this phase of the juvenile court act, we must not overlook the fact that the act had its origin in the protection that is due the innocent or helpless. Jones v. State, 175 Neb. 711, 123 N. W. 2d 653. It was never intended that the method provided for its operation should be a trap to prevent such protection. If

it can possibly be avoided, this court should not adopt a construction which would have that effect.

"The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficent purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms. As was said in State ex rel Miller v. Bryant, 94 Neb. 754, 144 N. W. 804, the juvenile court law did not create a new court, it merely gave a court with general common law equity jurisdiction new and additional powers. * * *

* * * * * *

As long ago as 1922, this court stated in the case of *Laurie v. State*, 108 Neb. 239, 188 N. W. 110, beginning at page 242:

* * * * * *

"* * * A commitment to the industrial school upon such a charge is not a conviction of a crime or a commitment to a penal institution. This question of a right of trial by jury was before the Supreme Court of Wisconsin in *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, * * *

"The commitment of a child to an industrial school is not a punishment for crime, but to furnish the child needed guardianship, maintenance, and care for its benefit and that of society, is not an interference with personal liberty requiring a trial by jury to justify it."

Judge Marshall in discussing the question of the right of a trial by jury and the object and purposes of the law, says in his opinion:

"The proceeding is not one according to the course of the common law in which the right of

trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever—but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint for imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. * * *

Nebraska law has for years been ahead of other States in affording due process in the area of juvenile proceedings and it has kept pace with recent decisions such as *In re Gault, supra*. Section 43-205.08, (Appendix A, p. 17). Will a jury trial in juvenile court give us a "more perfect" justice or will it only further clutter the already overcrowded court calendar and tear the very essence from the juvenile court system.

In the trial of criminal cases, it is obvious from the following tables that by the slightest concerted effort

defense attorneys by the simple device of merely insisting upon a jury trial could throw the administration of criminal justice in this country into chaos. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, page 9, sets forth the following:

"* * * * *

"The question of guilt or innocence is not contested in the overwhelming majority of criminal cases. A recent estimate is that guilty pleas account for 90 percent of all convictions; and perhaps as high as 95 percent of misdemeanor convictions. But the Commission has found it difficult to calculate with any degree of certainty the percentage of cases disposed of by guilty plea, since reliable statistical information is limited. Clearly it is very high. The following statistics indicate the number and percentage of guilty plea convictions in trial courts of general jurisdiction in States in which such information was available.

State (1964 statistics unless otherwise indicated)	Total convictions	Guilty Pleas	
		Number	Percent of total
California (1965)	30,840	22,817	74.0
Connecticut	1,596	1,494	93.9
District of Columbia (year ending June 30, 1964)	1,115	817	73.3
Hawaii	393	360	91.5
Illinois	5,591	4,768	85.2
Kansas	3,025	2,727	90.2
Massachusetts (1963)	7,790	6,642	85.2
Minnesota (1965)	1,567	1,437	91.7
New York	17,249	16,464	95.5
Pennsylvania (1960)	25,632	17,108	66.8
U.S. District Courts	29,170	26,273	90.2
Average [excluding Pennsylvania]			87.0

"* * * * *"

It takes no imagination to prophesy that the increase in percentage of jury trials could easily delay a case for several years, which in the case of growing children whose personalities and learning change daily, is much

more critical than in the case of adults. Assuming the courts can be of assistance to the child, the delay would be so great that it would in many cases be too late to help.

The Honorable Morris Miller, Chief Judge of the Juvenile Court of the District of Columbia, testifying before the United States Senate Committee on Appropriations Subcommittee on the District of Columbia on May 7, 1969 (according to the uncorrected transcript—the corrected not yet being available) pointed out the following circumstances in his court where jury trials are available:

"* * * * *

"This is our quarterly report that just came out and it covers January, February, and March of 1969. It compares the referrals for delinquency to the Juvenile Court with a similar quarter, that is, the preceding 3-month period of October, November, and December of 1968. Although the total increase is 3 percent, it conceals the actual seriousness of some of those offenses.

"Although the actual overall increase is 3 percent, the actual increase in serious crimes of violence is 15 percent.

"Senator Proxmire. Among juveniles?

"Judge Miller. Yes, sir.

"* * * * *." (P. 620)

"* * * * *

"Senator Proxmire. All right.

"Let me ask you, what is the Juvenile Court's present backlog?

"Judge Miller. The total backlog on juvenile cases is 2,775. On the adult cases, 606. Total backlog, 3,381.

"Senator Proxmire. What does this mean in terms of time?

"Judge Miller. Well, it depends on what the particular posture of the case is.

"Senator Proxmire. For example, I have a letter here from you, on April 18, D. C. Budget Officer, in which you say in part the Court has two jury days per week scheduling 16 jury cases for these two days.

" 'I testified that two full days a week are allocated by the Juvenile Court to jury trials. At that rate, assuming the unlikely event there would be no more requests for jury trials, it would take 2½ years just to dispose of the jury trials pending.'

"Judge Miller. That is right.

"Senator Proxmire. Does this mean that you have a backlog of 2½ years?

"Judge Miller. Again, I must say it depends on what posture you are talking about. If you are talking about jury trials, yes.

"Senator Proxmire. I am reading your letter and I want an explanation.

"Judge Miller. That is just talking about jury trials.

"Senator Proxmire. That is what I want.

"Judge Miller. It is bigger now.

"Senator Proxmire. It is more than 2½ years?

"Judge Miller. I would say it is closer to 6 years.

"Senator Proxmire. Six years?

"Judge Miller. There were 242 juveniles awaiting jury trial as of March 31, 1969.

"Senator Proxmire. It is closer to 6 years; what do you mean it is closer to 6 years?

"Judge Miller. Because you cannot have more than 40 jury trials a year.

"Senator Proxmire. I see. So you say you have 240 pending and therefore it is 6 years?

"Judge Miller. That is right.

"But I do not want you to believe that we are going to wait all that length of time.

"Senator Proxmire. I want to be reassured. What are you going to do about it?

"Judge Miller. Well, that 242 is going to be decreased as cases are calendered and the same juvenile may be in the Court's jurisdiction on another offense, so that the jury calendar, that jury trial, will be canceled. Many of those cases are going to be dismissed because of the inordinate length of time from the time of denial to the time of jury trial and the Government is not able to produce its witnesses.

"Complainants are not available.

"Senator Montoya. Mr. Chairman, may I interject here?

"Senator Proxmire. Yes.

"Senator Montoya. Do I understand you to say that you can only have about 40 jury trials a year?

"Judge Miller. Of juveniles.

"Senator Montoya. Yes, of juveniles.

"Judge Miller. Yes.

"Senator Montoya. How many juvenile Judges do you have?

"Judge Miller. Three.

"Senator Montoya. And this is all the allocation that you have made?

"Judge Miller. We have two jury trials a week, one for juveniles and one for adults.

"Senator Proxmire. That is one a week, roughly, a little less than one a week of juveniles.

"Judge Miller. We have, of course, on the other day of the week, we have the adults' trials.

"Senator Proxmire. It is beyond me. I am new to this chairmanship of this Committee; Joe is a lawyer, I am not a lawyer, and he is perhaps more familiar with this. But it baffles me how you can have a backlog of 240 cases and try 40 a year and not have gross injustice, the situation where you have people waiting for a jury trial not for months, but literally for years.

"Judge Miller. But, Senator, this is not the first time this has been mentioned. I have been asking for more Judges for this purpose for years.

"Senator Proxmire. I do not say it is the first time it has been mentioned. I am just wondering what you feel we can and should do about it. What are you asking for here that is going to enable you to cut down on this backlog, substantially, make real inroads?

"Judge Miller. On the jury trials, nothing.

"Senator Proxmire. Do you not think you should? Do you not have the responsibility to do so?

"Judge Miller. The only answer is more Judges, and that is not in our budget here.

"* * * * *." (pp. 633 to 639)

(Note: It should be emphasized that besides the 242 juvenile jury case backlog, the court had a 2,533 non-jury juvenile backlog according to the judge's testimony, supra.)

"* * * * *."

"Senator Proxmire. Just briefly then, tell me what are the consequences as far as the person who is awaiting trial, the juvenile awaiting trial. If he has to wait for years, what happens to him.

"Judge Miller. Well, the rate of repeating is so great, that in at least a third of these cases he is going to be apprehended on another offense while he is waiting.

"Senator Proxmire. Does this mean it is impossible to have any effective correctional action during this period?

"Judge Miller. No, sir.

"Senator Proxmire. Well, it is not possible to have the same kind of effective preventive action or corrective action; is that correct?

"Judge Miller. I agree with you. I do not think it is possible.

"But, you must understand, Senator, this is a relatively recent development. When I went on the bench in October of 1962, there were two juvenile jury cases awaiting trial. Today there are 242.

"Senator Proxmire. What is the reason for that?

"Judge Miller. The reason for that is that we have emphasized the need for lawyers.

"Senator Proxmire. They are asking for jury trial?

"Judge Miller. They are denying and asking for jury trials. The rate of denials is much higher than it has ever been compared to the rate of acknowledgements as it used to be.

"Senator Proxmire. Is 40 a year about the best base you have, have you done better than that in the past at any time?

"Judge Miller. I am just averaging the number of jury days that are available, and there seems to me to be about 40.

"Senator Proxmire. This has been the practice?

"Judge Miller. Yes.

"Senator Proxmire. How does this compare with other cities; do you have any idea?

"Judge Miller. I do not know that other cities, except for maybe one or two, have jury trials for juveniles.

"* * * * *." (pp. 640 to 642)

The Supreme Court of the United States in *Application of Gault*, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, in striking down Arizona procedural processes stated that they were a violation of "the essentials of due process and fair treatment." The four items of due process touched upon by the court were:

1. Notice of charges.
2. Right to counsel.
3. Confrontation, self-incrimination, cross examination.
4. Appellate review and transcript of proceedings.

These procedures are, and have been, followed by the Nebraska courts for years.

In the case of *In Re Roth*, 158 Neb. 789, 64 N. W. 2d 799, the Nebraska Supreme Court set out the necessity for notice of charges as follows:

"* * * * *.

"* * *. The purpose of the requirement clearly is to apprise the parent or custodian timely of a charge against the child and to afford a reasonable opportunity to safeguard his rights, interests, and liberty.

"Without that protection a child of tender years could well become the victim of the merciless and be deprived of the constitutional and traditional safeguards which are guaranteed to even socie-

ty's most depraved adult. Such a situation would be intolerable. See, Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308; Ripley v. Godden, *ante* p. 246, 63 N. W. 2d 151.

"* * * * *."

As to the minor's right with reference to confrontation, self-incrimination and cross examination, the Nebraska Supreme Court has repeatedly and emphatically required that the boundaries of due process be respected. In the case of *In re Sanders,* 168 Neb. 458, 96 N. W. 2d 218, the Nebraska Supreme Court stated as follows:

"* * * * *.

"The rules of evidence are applicable to a hearing of a charge made under the Juvenile Court Act and they must be substantially observed. It is only legal evidence which can establish a charge under the act or sustain a judgment rendered in the proceeding involving the charge. It has been previously said and is now affirmed that in a hearing before the Juvenile Court the customary rules of evidence must be adhered to and a finding of fact may not rest on or be sustained by hearsay or unsworn statements; that the essential processes, rules, and procedures of the law established and observed to guide and aid courts in the trial and decision of issues of fact are applicable to proceedings under the Juvenile Court Act and they are not permitted to be disregarded because the act refers to such a proceeding as a summary one; and that an issue of fact in such a proceeding must be heard and determined by observance of the rules of evidence that are considered essential and appropriate to ascertain the truth and to protect substantial rights in hearings had without a jury for the adjudication of issues of fact of civil cases in the district court. Krell v. Mantell, *supra*; Ripley v. Godden, *supra*; State ex rel. Fitzgerald v. Barkus,

ante p. 257, 95 N. W. 2d 674; Annotation, 43 A. L. R. 2d 1141.

"* * * * *."

In the case of *In Re Mantell,* 157 Neb. 900, 62 N. W. 2d 308, the Nebraska Supreme Court quoted with approval from a New York State case as follows:

"* * * * *.

"* * *. The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules. Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, the hopes and fears of social workers, are all sources of error and have no more place in Children's Courts than in any other court.

"* * * * *."

The matter of appellate review and transcript of proceedings has always been respected in Nebraska. The County Court and the District Court have concurrent jurisdiction, both courts being courts of record, and procedure for appeal from County Court to District Court and from District Court to the Supreme Court of Nebraska are all provided by statute. The Nebraska Supreme Court in 1959, in the case of *In re Sanders, supra,* stated as follows:

"* * * * *.

"This is a special statutory proceeding. The adjudication made herein by the trial court is reviewable in this court by appeal. Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122; Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. The manner of disposing of such an appeal in this court is by trial de novo. See, Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823;

Rhoades v. State Real Estate Commission, 152 Neb. 701, 42 N. W. 2d 610.

"* * * * *"

The Supreme Court of the United States, in the case of *In Re Gault, supra,* did not, by any stretch of the imagination, indicate that juveniles were to be tried exactly as criminal adults, but they recognized that children are different from adults. The court said:

"* * * * *.

"* * *. 'We do not mean * * * to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.

"* * * * *."

The *Gault* case goes on to say that the "condition of being a boy does not justify a Kangaroo Court." The court does not then say one word about requiring a jury trial for a juvenile delinquency hearing. The court does, however, go on to say:

"* * * * *.

"* * *. 'Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.'

"* * * * *."

It is difficult to see how the "loose procedures" could be corrected or in any way changed by the addition of a

jury trial in Juvenile Court. It is difficult to see how "high-handed methods", or "Kangaroo Courts", could be corrected by the introduction of a jury trial into the Juvenile Court procedure. It is also difficult to see how "crowded court calendars" could be alleviated by the introduction of a jury trial into Juvenile Court procedure. Quite the contrary is true. "Crowded court calendars" would become even more crowded with advent of jury trial into Juvenile Court procedure. "High-handed methods" and "Kangaroo Courts" can be best checked on by the supervisory courts as can "loose procedures" which may occur in Juvenile Court. The addition of a jury trial in the Juvenile Court would correct none of these evils.

This Court in *Gault* set forth in detail and quoted frequently from the recommendations of The President's Commission on Law Enforcement and Administration of Justice "The Challenge of Crime in a Free Society". *Re Gault*, 387 U. S. 1 at 38. It is of particular importance to note that of the recommendations set forth by the National Crime Commission Report the right to a jury trial in juvenile court and to be proven guilty beyond a reasonable doubt are conspicuously absent. On the other hand the recommendations set forth by the Commission and the actual holding of *Re Gault* are carefully complied with in Nebraska Juvenile Court Law, Sections 43-201, et seq. (Appendix A).

In the Task Force Report: "Juvenile Delinquency and Youth Crime", p. 38, The President's Commission on Law Enforcement and Administration of Justice enlarges upon the report set forth in "The Challenge of Crime in a Free Society", and states as to jury trials:

"*Trial by Jury*

"Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.

"As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge.' The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties. Moreover, the presence of a jury affects the whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect, and emotion rather than a more businesslike presentation.

"A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.*, incorrigibility, need for care and supervision,

truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

"As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. 'This too might be lost, and justice still be done.' "

Other authoritative persons who have deeply studied this question have arrived at the same conclusion. In the latest draft of the "Uniform Juvenile Court Act", drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states at its Annual Conference, July 22—August 1, 1968, which was approved by the American Bar Association at its meeting at Philadelphia, Pennsylvania, August 7, 1968, it provides in this regard, Section 24, page 20:

"(a) Hearings under this Act shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 3.

"* * * * * *"

A distinguished group of judges throughout the nation intimately conversant with the problems of crime and delinquency has recently gone on record as favoring adjudicatory hearings without a jury in juvenile courts. In "Model Rules for Juvenile Courts" adopted by the Council of Judges of the National Council on Crime and Delinquency 1969, while not specifically so stating, it is clear from the rules that no jury is con-

templated. Rule 23, page 49, and Rule 24, page 51, together with the comments thereon, are as follows:

"Rule 23. Order of Proceedings

"The court shall begin the hearing by determining whether all parties are present and whether lawful notice of the hearing has been given, and it shall require that these facts be of record. It shall then inform the parties of the substance of the petition.

"Before taking testimony, the court shall explain to the child and his parents their rights as set forth in Rules 38 and 39 and shall assign counsel if required by Rule 39.

"When the court has explained to the child the meaning of the right to remain silent and finds that he adequately understands this right, it may inquire of the child in a case brought under [section of juvenile court ~~law~~ dealing with jurisdiction because of the child's violation of law or of a required standard of behavior] whether he admits or denies all or some of the allegations in the petition. Failure or refusal of the child to admit the allegations shall be deemed a denial of them.

"If any or all of the allegations of the petition admitted by the child are sufficient to give the court jurisdiction, the court may take testimony to corroborate the admission or may proceed directly to the adjudication."

"Comment

"In all cases in which a child's behavior is at issue, the child and his parents should be present at the start of the hearing. See Rule 36. If an adult party cannot be found or refuses to appear at the hearing, the court shall either appoint a guardian *ad litem* for the child, as provided in section 15 of the Standard Acts, or shall appoint an attorney for the child. An attorney should be appointed, if necessary, to represent the absent parties.

"Although the parties have been notified before the hearing of their right to counsel, the court must make an independent inquiry into the question of representation if they appear without counsel. Section 19 of the Standard Acts requires the court to inform the child and his parents of their right to counsel, and this requirement cannot be delegated to an intake officer. Unless representation by counsel is competently and intelligently waived, as provided in Rule 39, the court must assign counsel before the hearing can proceed.

"If the child understands his rights, it is appropriate that he 'plead' to the allegations. Such a procedure is provided in the Supreme Court of Alaska's Rules of Juvenile Procedure, R. 12(e)(4), and is adopted here. In the vast majority of juvenile court cases, the child admits the allegations of the petition, and the admission may obviate the necessity for a full hearing. The court may, of course, call witnesses to corroborate any admissions.

"Judge Luther W. Maples, of the Harrison County Court, Gulfport, Miss., disagrees with paragraph two of this rule, and states:

"It is not the duty of a civil court to advise litigants that they are entitled to an attorney or that they do not have to make a statement admitting the allegations contained in the declaration, bill of complaint, or allegations in the interest of the child. This is not to say that a litigant has no right to be represented by an attorney, that a litigant has no right to be heard before the court, or that the court should not be interested in obtaining the truth in any case. However, when a litigant is advised that he does not have to answer any question, that he has the right to remain silent, and that he has the right to an attorney, a criminal hearing is created."

"Rule 24. Preparation and Presentation of Evidence

"If the allegations of the petition are in issue, whether the testimony shall be elicited by the court or by a civil legal officer of the state or a subdivision thereof shall be determined by the court: The court shall base its determination on the complexities inherent in the case."

"Comment

"In most cases, testimony should be elicited by the judge, who can insure the legality of the proceeding while maintaining the informal atmosphere that has traditionally permeated the juvenile court. On occasion, when the court anticipates complex questions of introduction of evidence, it may find it advantageous for the state's case to be elicited by an attorney, who can present the proof in appropriate order and control the testimony that will be given.

"The prosecutorial atmosphere of criminal trials should have no place in juvenile courts. The purpose of the hearing is the elicitation of facts, avoiding the urge to obtain convictions prevalent in criminal courts. Prosecutorial techniques should therefore be avoided; if it is necessary for the facts to be elicited by an attorney, he should not be a member of the prosecutor's office.

"The eliciting of testimony by a probation officer, untutored in the law, is not conducive to an orderly hearing and tends to undermine the child's faith in the impartiality of the probation staff, which may be called upon after disposition to work with the child. If the probation officer is in possession of facts related to the acts alleged in the petition, his role at the adjudicatory stage is only that of a witness.

"Some members of the Council of Judges and the National Council of Juvenile Court Judges maintain that in any contested juvenile case, the testimony cannot be successfully elicited by the court and that it should be elicited by a civil legal officer. They hold that the same objections to presen-

tation of the case by the probation officer apply to its presentation by the court and that, in addition, a judge cannot listen to the testimony and observe the reactions of the parties while he frames questions to be posed to a witness."

The Supreme Court of Pennsylvania in a case decided since the *Gault* case, *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 234 A.2d 9, the court made the following observation with reference to delinquency proceedings:

"* * * * *.

"* * *: 'The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective, —aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as parens patriae.' * * *.

"* * * * *."

In a footnote to this Pennsylvania case, the following observation is made:

"Certainly implicit in *Gault,* is that procedural safeguards alone are no panacea. The institution of these safeguards in court proceedings will not arrest juvenile delinquency unless its root causes are also attacked."

The court then summarized the view of what they felt juvenile courts should be, as follows:

"* * * * *.

"The Supreme Court's opinion should not be viewed by the Courts or Judges of this Commonwealth as a mandate to abandon the juvenile court

> adjudicative procedure. Rather, it is an invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds. The Supreme Court, in our view, recognized that there are essential differences between the trial of adults and juveniles. Similarly, juvenile court judges must recognize these differences and exercise their discretionary powers, if the aims or purposes of the juvenile court are to be achieved.
>
> "* * * * *"

and the court further set out the reasons why it is imperative that the juvenile court, as such, remain flexible within the framework of due process at page 16 of 234 A. 2d, in the following words:

> "* * * * *
>
> "During the actual court hearing, the juvenile court judge, after weighing the serious nature of the crime, the age of the child and the possibility of incarceration, must exercise his broad discretionary powers which allow him to employ techniques designed to serve the best interests of the child. He need not apply the same procedure for the incorrigible and the rapist, for the ten year old charged with larceny of a bicycle and the seventeen year old charged with armed robbery. He must be prepared to order further studies or testimony, in satisfying himself that he has sufficiently delved into all aspects of the case.
>
> "* * * * *"

Estes v. *Superior Court*, 73 Wash. 2d 272, 438 P. 2d 205, which was also decided since the *Gault* case, decided that a jury trial for a juvenile is not a requisite of due process and so stated as follows:

> "* * * * *

"We do not believe that the Supreme Court's opinion in *Gault*, supra, is to be considered as a mandate to abandon this beneficial concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury.

"* * * * *."

Just exactly how does the jury trial fit into a system of justice. Courts of equity always sit without a jury. The Supreme Court of the United States in the case of *Jackson* v. *Denno*, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, in discussing the reason for requiring that a Judge first pass upon a confession before a jury hears it, discusses shortcomings of juries as follows:

"* * * * *.

"* * *, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?

"* * * * *."

In *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86

L. Ed. 1595, in discussing jury trials and Maryland's practice of having defendant waive a trial by jury, the court said:

"* * * * *.

"* * *. Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved.

"* * * * *."

The case of *Duncan* v. *State of Louisiana*, 391 U. S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444, is a criminal prosecution against the defendant. This case is a non-criminal type proceeding not in existence at common law upon which the constitutional right to jury is based. Further in *Duncan*, the Court recognized the ability to get a fair trial to a court, stating at 391 U. S. 158:

"* * * * *.

"* * *. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. * * *.

"* * * * *."

The case of *Bloom* v. *State of Illinois*, 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477, is a case of criminal contempt of court proceedings which deals with the actions of an adult. As this court stated at 391 U. S. 201:

"* * * * *.

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. * * *.

"* * *. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. * * *.

"* * * * *."

In Mr. Justice Harlan's dissent in the case of *Miranda* v. *Arizona*, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, at page 526, Mr. Justice Harlan set out the following quotation from Mr. Justice Jackson with reference to the court's "interpretation" of the Federal Constitution:

"* * *: 'This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.'"

Indeed will not the adding of a jury trial into the juvenile court be adding one too many stories to the temple of constitutional law?

While proponents of a jury trial frequently state that the fact that a child may be "incarcerated" until age twenty-one ipso facto make delinquency a "serious offense" within *Duncan* and *Bloom*, they ignore the fact that in many cases the training school or other institution in which the child is placed is frequently better than their own home, the military school or even common school in which many children are placed by their own parents or required to attend by state law; they are far superior to many of the so-called feeble-minded institutions in which children are incarcerated without a jury. Children are under a legal disability

in much the same way as mentally retarded, mentally ill, and aged individuals. Any case of institutionalizing by persons in authority (or even by certain relatives) whether it be because of senility, mental retardation, delinquency, dependency, feeble-mindedness or other reason, could be called "incarceration" and the same due process requirements apply. As demonstrated by the Nebraska case law and statutes set forth herein the State of Nebraska has gone a long way in the case of juvenile court proceedings in providing notice, serving a copy of the complaint, counsel, rules of evidence, et cetera. With these protections available the historical arguments for a jury expressed in *Duncan* v. *Louisiana, supra*, to avoid oppressiveness, et cetera, would not seem to be valid. (The juvenile is certainly much more protected than in the other forms of "incarceration" listed above.) Of course, in any determination of the status of an individual the fact-finding procedure is of utmost importance. It is generally conceded, as it was in *Duncan* v. *Louisiana, supra*, that courts, without juries, are capable of having an adequate fact-finding process. In the case of children, the problems of publicity and the difficulty of providing a jury "of their peers" further emphasizes the suitability of trial to the court. The Honorable Lindsay G. Arthur, Vice President of the National Juvenile Court Judges Association, in an excellent article exemplifying some of the practical problems peculiar to juvenile trials stated in this regard:

> "D. Public Trial?
>
> "Anyone who enjoys seeing his name in print as a lawbreaker is a potential criminal, and the sooner he's put away the better.
>
> * * *
>
> "Publicity is painful but necessary. Most people have good youngsters they want to keep away

from the hoodlums. How can they do it if they don't know who the hoodlums are?

* * *

"Giving publicity to a delinquent doesn't destroy him. In all cases I have seen it has improved his behavior.

Judge Lester Loble[30]

(30. *Montana's Experiment with Juvenile Crime*, Vol. 75, No. 6 AMERICAN LEGION MAGAZINE 50 (1963).)

"In one short year . . . in the court presided over by (Judge Lester Loble) there has been a 58 per per cent increase . . . in juvenile felony cases. . . .[31]

(31. *Open Hearings in Juvenile Courts in Montana*, Statement by the National Council on Crime and Delinquency (Nov. 1964).)

"'Publicizing a juvenile delinquent brands him—and his brothers and sisters—and isolates him into the company of other delinquents, with little preventative effect. But, not publicizing delinquency proceedings threatens both the child and the public that their proper interests will be arbitrarily handled—or ignored. Traditionally the adult courts have accepted the public's 'right to know' as a needed protection both to the accused and the victim, and upon an unproven belief that punishment is a deterrent to others. In their brief history of only some seven decades, the juvenile courts have accepted the child's 'right to privacy' as a more needed protection from public retribution. There are five principal influences attributed to public trial. First, it protects the accused from an arbitrary court. But a lawyer, a court reporter, and an appellate court can provide better protection. Second, it assures the victim that an eye has been given for his eye. But the *lex talionis* has been repealed. Third, it deters others from criminal conduct by fear of known punishment. But there is better authority to the effect that the real deterrent is the fear of getting caught. Fourth, it drives the guilty into further crime by isolating

them into a criminal environment, publicity's real fault. Fifth, it protects the public from judicial disregard of dangerous conduct, publicity's real value. A simple rule which protects the public without needless harm to the accused, and without duly restricting freedom of the press requires that: *news media should be accorded full access to juvenile court proceedings, but should be forbidden to identify any participating juvenile.*

"E. Jury Trial?

"A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact-finding process than trial before a judge.

"A jury of peers is a protection to both the public and the individual from authority and judicial whim. Peers have a degree of sympathy, they can relate to the accused and understand in some measure his idiom and his world. But children are children's peers, and children can't be tried by a jury of children. Yet adults can't understand long hair, and teeny-bop talk, and the driving fear of being left out, and the perplexing problem of identity for a changing body with a changing mind in a changing world. Adults can be taken in by giving a hoodlum a suit, a tie, and a crew cut, and adults can be put out by the normal rebellion of children striving for independence. Possibly judges who are in constant touch with juveniles come closest to being their peers—if empathy is peerage. And in a court of equity, from which the juvenile courts have evolved, it was thought that: *where remedies were needed beyond law's rigidities, justice can better come from judges than from juries.*" (Footnotes supplied in parenthesis.) (Vol. 45, No. 2, North Dakota Law Review, Winter 1969, "Should Children Be As Equal As People?", p. 204, at 213-215.)

Apparently, appellant in the present case was satisfied with the fact-finding procedure and the determi-

nation of facts made by the County Court of Dodge County, Nebraska, inasmuch as he failed to appeal therefrom but instead instituted this case in habeas corpus. Had the appellant chosen to appeal from the County Court hearing, under Nebraska law, he would have received a trial de novo of the facts by a judge of the District Court and a trial de novo of the facts on the record by seven judges of the Nebraska Supreme Court. Section 25-1937, R. R. S. Nebraska 1943, *Krell* v. *Mantell*, 157 Neb. 900. Here again, the Nebraska procedure stands out as a judicial as opposed to a social type court procedure which exemplifies the careful protection given to a juvenile which eliminates the need for the intercession of a jury to shield him from the oppression of the state.

In balancing the pros and cons surely the delay and consequent damage which would result, to a child whose personality is daily changing, by providing jury trials outweighs any benefit to be gained from a jury trial, especially in view of the many safeguards in the Nebraska judicial system.

In a comment to Section 24 of the Uniform Juvenile Court Act, *supra*, the Commissioners stated in regard to public trials, at page 20 thereof:

"* * * * *

"There has been some recent tendency to permit publicity to juvenile court proceedings, on the theory that this will act as a curb to juvenile delinquency. There is little evidence to support this theory and considerable indication that it affords the hard core delinquent the kind of recognition he wants. On the other hand, the harm it causes may be great in the case of the repentant offender.

"The section as drawn permits the court in its

discretion to admit news reporters. This is frequently done with the understanding that the identity of the cases observed will not be published, a procedure generally satisfactory to the news media.

"* * * * * *"

II.

Constitutional Due Process of Law Does Not Require a Certain Measure of Proof in a Juvenile Proceedings, Other Than Due Process Would Require For Any Civil Proceedings.

Proof beyond a reasonable doubt has always been an accepted measure of proof in a criminal prosecution. Delinquency is not a criminal prosecution. As stated in *Binkley* v. *State*, 34 Neb. 757, 52 N. W. 708:

"* * * * *

"* * *. It is a serious matter, not only to a party, but to the state as well, to take a person from the ordinary avocations of life, brand him as a felon and deprive him of his liberty, appropriate his labor and cast a cloud upon his future life and humiliate his relatives and friends; and to authorize the state in doing this there should be no reasonable doubt of his guilt. * * *.

"* * * * * *"

Delinquency does not brand the youth a felon, and does not carry the implications or the disabilities that conviction for a felony carries. When a person under the age of eighteen years sets into action a series of events which lead to a violation of a State Statute, he can be dealt with in one of two ways. He can be treated as a person in need of aid and assistance by taking him to the Juvenile Court, or his actions can be treated as criminal conduct and he can be placed on

criminal trial to answer criminally for this conduct and there have a determination made upon the criminal standards as set out by the Constitution.

Other jurisdictions have held that proof by a preponderance of the evidence is sufficient. In the case of *In Re Wylie,* 231 A. 2d 81, (the District of Columbia Court of Appeals, 1967), which has been decided since the *Gault* decision, that court held:

"* * * * *.

"Appellant also argues that it was error for the court to charge that the burden on the government to prove the allegations was by a preponderance of the evidence. Appellant says the burden should have been that of beyond a reasonable doubt. The decision in *Gault* alluded to but did not pass upon the question of the degree of burden of proof in Juvenile Court cases (Id. at 11, Note 7). We adhere to our ruling in In re Bigesby, D.C. App., 202 A. 2d 785, 786 (1964), that 'the strictly criminal law concept of guilt beyond a reasonable doubt' is unnecessary and improper in a Juvenile Court proceeding.

"* * * * *."

In Re Agler, 15 Ohio App. 2d 240, 240 N. E. 2d 874, is another case decided since the *Gault* case in which the court held that a preponderance of the evidence is the proper quantum of evidence required in a delinquency hearing.

In the California case, In Re M., 75 Cal. Rptr. 1, 450 Pac. 2d 296, the court concluded that the proper measure of proof is by a preponderance of the evidence as follows:

"* * * * *.

"In California we do not write upon a clean slate.

For the first half-century of their existence our juvenile court statutes contained no provision on this topic, and a wide variety of standards of proof was in actual use. In 1957, however, a special commission was created to survey and evaluate the administration of juvenile justice in this state and submit recommendations for legislative action. After three years of field studies, hearings, drafts, and conferences with experts and practitioners alike, the commission filed its report. On the important issue of procedural rules, the commission *poisted* that 'The problem in attempting to establish acceptable juvenile court procedures is to attain a working balance between two essential objectives—first, preserving the guarantee of due process to the minor; and second, establishing an informal court atmosphere so that potentially harmful effects of the proceedings are minimized and the minor's receptivity to treatment is encouraged.' (Rep. of Governor's Special Study Com. on Juvenile Justice (1960), pt. I, p. 29.) Mindful of both these goals, the commission concluded (at p. 30) that 'All of the reasons for employing rules of evidence in other judicial proceedings, e.g., to insure truthful, reliable, and fair testimony, apply with equal force to a hearing on a minor's delinquency or a hearing in which a child may be removed from his family because of parental neglect. * * * On the other hand, the Commission sees no valid reason for requiring the degree of proof customary in criminal cases. It is our opinion that requiring proof of the jurisdictional facts by a preponderance of evidence will sufficiently safeguard the rights of the minor so long as the court scrupulously observes the presumptions of lawful conduct and circumstance until the allegations are actually proven in open hearing.' Accordingly, the commission recommended that the standard of proof in juvenile court matters be a preponderance of the evidence, and the Legislature so provided. (Stats. 1961, ch. 1616, p. 3482.)

"* * * * *"

The most recent case on the matter of standard of proof required in a juvenile proceeding is the New York case, *In the Matter of Samuel W.*, 24 N. Y. 2d 196, 247 N. E. 2d 253. This was a delinquency charge for stealing $112.00 from a pocketbook. The court discussed the matter of standard of proof as follows:

"* * * * *

"It is not easy to define for the purposes of practical application the tenuous difference between 'beyond a reasonable doubt' as a quantitative or qualitative test of proof, and 'by a fair preponderance of the evidence'. It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a 'higher' standard.

"But the standard is in the present case expressly stated by statute; and, indeed, by a statute which goes very far in providing due process safeguards for children in delinquency proceedings in Family Court. The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision; and, since the proceeding is quite different from a criminal prosecution, it seems reasonable to think there is no substantial equal protection question in the case.

"* * * * *"

The juvenile proceeding being equitable or non-criminal in nature allows a different proof than in a criminal case and likewise has a different consequence than any criminal case. If we are to require that cases of all ages involving a certain set of facts demand certain stereotyped procedures, where, then, is our system of justice. If we force a juvenile to be tried the same as an adult criminal and allow a juvenile a different disposition, are we not then refusing equal

protection of the laws to the adult criminal in that some person, strictly by happenstance of age, is being treated differently than another. If, on the other hand, we are searchong for justice within the "essentials of due process and fair treatment," then we believe the proof by a preponderance of the evidence is a reasonable standard to be used in the proceedings against a juvenile in a Juvenile Court. The Uniform Juvenile Court Act, *supra*, sec. 29(c), p. 24, provides:

> "(c) If the court finds from clear and convincing evidence that the child is deprived or that he is in need of treatment or rehabilitation as a delinquent or unruly child, the court shall proceed immediately or at a postponed hearing to make a proper disposition of the case."

The Council of Judges of the National Council on Crime and Delinquency takes the same position in their "Model Rules for Juvenile Courts," *supra*, Rule 26, p. 57:

> "Rule 26. Standard of Proof
>
> "The facts alleged in the petition shall be proved by clear and convincing evidence."

In discussing the use of evidence, The President's Commission on Law Enforcement and Administration of Justice in "Task Force Report: Juvenile Delinquency and Youth Crime" stated at page 35:

> "* * * * *
>
> "Perhaps the height of the juvenile court's procedural informality is its failure to differentiate clearly between the adjudication hearing, whose purpose is to determine the truth of the allegations in the petition, and the disposition proceeding, at which the juvenile's background is considered in connection with deciding what to do with him. In many juvenile courts the two questions

are dealt with in the same proceeding or are separated only in the minority of cases in which the petition's allegations are at issue. Even where adjudication and disposition are dealt with separately, the social reports, containing material about background and character that might make objective examination of the facts of the case difficult, are often given to the judge before adjudication. .

"To lessen the danger that information relevant only to disposition will color factual questions of involvement and jurisdictional basis for action, the Children's Bureau and others have for some time recommended bifurcating juvenile court hearings into adjudicatory and dispositional proceedings, just as traditionally in the trial of criminal cases there is a sharp division between trial on the issue of guilt and the sentencing determination. Both New York and California have recently adopted this procedure. It makes possible a controlled and relatively narrowly focused inquiry into the facts of the alleged conduct at adjudication and a more general and searching inquiry into factors bearing upon need for supervision at disposition, thus reducing the danger that the limitations of the adjudicatory hearing will unduly narrow the dispositional determination and that the demands of information appropriate to the dispositional hearing will unduly enlarge the scope of the adjudicatory hearing. Under the proposal of the Children's Bureau, for example, 'Findings of fact by the judge of the validity of the allegations in the petition shall be based upon a *preponderance of evidence* admissible under the rules applicable to the *trial of civil causes*,' while '[i]n the disposition part of the hearing any relevant and material information, including that contained in a written report, study or examination, shall be admissible, and may be relied upon to the extent of its probative value.'

* * *

"* * * * * *." (Emphasis supplied.)

This is substantially what the Nebraska Juvenile Court Act has already done—Section 43-206.03(2) and (3).

III.

Whether the Prosecutor's Choice of Juvenile Proceedings, or Criminal Proceedings in a Case Involving a Juvenile, Violates the Fourteenth Amendment of the United States Constitution.

The reasoning of the appellant takes a rather circuitous route in arriving at his conclusion. The case of *Lane* v. *Brown*, 372 U. S. 477, pertains to indigence and stems from the problems caused by overcrowded court calendars as a result of overworked public defenders. The case simply says that even an indigent should have a choice of attorneys and the fact that the public prosecutor does not agree with him should not bar his right of appeal. *Lane* v. *Brown* has no application here.

In order to have effective justice in law, it is necessary to place at least a certain amount of trust in the public officials who have taken an oath to properly and faithfully administer their duties.

Beginning a proposition with a presumption that all prosecutors are enforcing laws according to their whims and not what is in the best interest of the public, whom they serve, is a damning indictment of prosecutors and one which we do not feel they deserve. Who is in a better position to decide in which court the complaint shall be filed. If we set up some other agency for making this determination, the prosecutor still must determine whether or not to take the matter to the agency. Trust and confidence must be placed in someone somewhere along the line, be it the prosecutor, the determining agency, the Juvenile Court, the State Su-

preme Court, or the United States Supreme Court. Every step further that the decision, which court the complaint shall be filed in, is removed from the prosecutor, amounts to a delay. The further the removal, the longer the delay.

Delay can be catastrophic in juvenile matters. If a child touches a red hot stove today and two years from now feels the burn, anyone with common sense can see he is going to be absolutely confused or in deeper trouble. Is it due process, as far as a growing and learning child is concerned, to burden him with these delays? Is this fundamental fairness, so far as the learning child is concerned, to remove the penalty so far from the incident that it is difficult for him to understand why it happened; and is society protected in the meantime—the testimony of the Honorable Judge Morris Miller, *supra*, would say not.

The responsibility for deciding which court to file a complaint against a juvenile rests with the prosecutor in the State of Nebraska. In order to give effect to the Nebraska Statute, 43-218, R. R. S. 1943, which states that the care, custody and discipline of the delinquent child "shall approximate, as nearly as may be, that which would be given by its parents", disposition must also approximate, as nearly as possible, parental disposition of any matter. Due process, so far as the child is concerned, requires that the prosecutor make a speedy decision and obtain a speedy disposition of the matter in the interest of any juvenile.

It is so well established throughout the world wherever our form of jurisprudence is followed as to need no citation of authority that a prosecutor may file a lesser or different charges when a certain set of circumstances constitutes more than one crime of varying de-

grees or gravity. Certainly no one would claim that a defendant's constitutional rights were violated, for example, where a prosecuting attorney filed simple assault amounting to a misdemeanor of such a nature as not to constitute a "serious offense" against a person who had shot another individual with a firearm which could also constitute assault with a deadly weapon or a felony charge.

Every day prosecuting attorneys throughout the world have to make the decision whether to file a felony, a misdemeanor, or nothing at all on every suspect brought to them. Certainly no one could ever successfully contend that those who were filed upon for a "non-serious offense," thus not entitling them to a jury trial, have had their constitutional rights violated because the serious crime was not filed.

Frequently in the law more than one forum or cause of action is open to the plaintiff which is not necessarily the choice of the defendant.

CONCLUSION

Children are supposed to obey their parents or those standing in their place. Children are not allowed to vote. Children are not allowed to enter into contracts for other than necessaries of life. Children are not allowed to drive cars. Children are not allowed to sit on juries. Children are required to attend school. Children are treated differently by everyone, including courts. The reasons for treating children differently vary from the inabilities of the child, to the need of the child for help. The child needs help and training in his formative years and the due process of law with reference to Juvenile Court actions must be correlated with the need for speedy determinations or the

effectiveness of the Juvenile Court, as an aid to children, is lost. If we are searching for a "perfect justice" for children—neither jury, proof beyond reasonable doubt, nor someone other than the prosecutor deciding which court shall be used, will give us this perfect justice. There can be mistakes made in any system of justice. Under the peculiar circumstances of Juvenile Court proceedings, neither jury, proof beyond reasonable doubt nor someone other than the prosecutor deciding what court shall be used, is required to satisfy due process.

Respectfully submitted,

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APPENDIX "A"

43-201. Juvenile courts; definition of terms. As used in sections 43-201 to 43-220, unless the context otherwise requires:

(1) This act shall be construed as referring exclusively to sections 43-201 to 43-220;

(2) Dependent child shall mean any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

(3) Neglected child shall mean any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child; or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child;

(4) Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance;

(5) A child in need of special supervision shall mean any child under the age of eighteen years (a) who, by reason of being wayward or habitually disobedient, is uncontrolled by his parent, guardian, or custodian; (b) who is habitually truant from school or home; or (c) who deports himself so as to injure or

endanger seriously the morals or health of himself or others; and

(6) Parent shall mean one or both parents.

43-202. Jurisdiction; district and county courts; police judge. The district courts of the several counties in this state, and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this act and concurrent jurisdiction under sections 83-220 to 83-223; the county court in each county shall have concurrent jurisdiction with the district court, but in counties having a population of more than fifty thousand such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county. Where a proceeding has been instituted under this act before any county court, the jurisdiction of this court over such proceedings shall continue until the final disposition thereof; *Provided,* appeal may be had to the district court in the same manner as is provided by law in civil cases. In cities having a population of forty thousand and upward, the police judge thereof shall have jurisdiction under this act concurrent with the county judge, within the limits of such city.

43-204. Judge of juvenile court in counties of more than 50,000; selection; juvenile record. In counties having a population of more than fifty thousand, the judges of the district court, on being inducted into office, shall select one of their number to preside over what shall be termed the juvenile court. The judge so selected shall serve throughout his term, unless the judges choose, in the same manner as the original selection was made, another of their number to so act. The judge of the juvenile court shall hear all cases arising under the provisions of this act, and shall give precedence there-

to. He shall also hear such other cases as may be assigned to him but may transfer such other cases to another judge for hearing or trial. A special courtroom, to be designated as the juvenile courtroom, shall be provided for the hearing of cases arising under the provisions of this act. The finding of the court in such cases shall be entered in a book or books kept especially for the purpose, one of which shall be known as the juvenile record.

43-205. Juvenile court; proceedings; by whom and how instituted; title of proceedings. The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a child in his county who appears to be neglected, dependent, delinquent, or a child in need of special supervision, may file with the clerk of the court having jurisdiction in the matter, a petition in writing, setting forth the facts verified by affidavit. It shall be sufficient if the affidavit is upon information and belief. Such petition and all subsequent proceedings shall be entitled In the Interest of , a Child Under Eighteen Years of Age, inserting the child's name in the blank.

43-205.01. Juvenile courts; child taken into custody without warrant; age limit; grounds; not deemed an arrest. A child under the age of eighteen years may be taken into custody by any officer of the peace without a warrant or order of court (1) when in the presence of the officer the child has violated a state law or municipal ordinance; (2) when a felony has been committed and he has reasonable grounds to believe such child committed it; (3) when such child is seriously endangered in his surroundings, and immediate removal appears to be necessary for his protection; or (4) when there are reasonable grounds to believe that he has run

away from his parent, guardian or custodian. Such taking into custody shall not be deemed an arrest.

43-205.02. Juvenile courts; temporary custody of minor; steps to be taken; alternatives permitted. An officer who takes a minor into temporary custody under the provisions of section 43-205.01, shall immediately take reasonable measures to notify the minor's parent, guardian, custodian, or relative and shall thereafter proceed as follows:

(1) He shall release such minor; or

(2) He shall prepare in duplicate a written notice requiring the minor child to appear before the juvenile court or probation officer of the county in which such minor was taken into custody at a time and place specified in the notice. The notice shall also contain a concise statement of the reasons such minor was taken into custody. He shall deliver one copy of the notice to such minor and require such minor or his parent, guardian, custodian, or relative, or both, to sign a written promise that such signer will appear at the time and place designated in the notice. Upon the execution of the promise to appear, he shall immediately release such minor. He shall, as soon as practicable, file one copy of the notice with the juvenile court or officer appointed by the court for such purpose or the probation officer; or

(3) He shall take such minor without unnecessary delay before the juvenile court or probation officer of the county in which such person was taken into custody and deliver the custody of such minor to the juvenile court or probation officer.

In determining which disposition of the minor he will make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, if such

alternative is compatible with the best interests of the minor and the community.

43-205.03. Juvenile courts; temporary custody of minor; investigation by probation officer; release of child, when. Upon delivery to the juvenile court or probation officer of a minor who has been taken into temporary custody under the provisions of sections 43-205.01 to 43-205.05, the court or probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody. The court may then either (1) immediately release such minor to the custody of his parent, guardian, or responsible relative, or (2) admit such minor to bail by bond in such amount and on such conditions and security as the court, in its sole and exclusive discretion, shall determine. In no case shall the court or probation officer release such a minor if it appears that further detention of such minor is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another or if it appears that such minor is likely to flee the jurisdiction of the court.

43-205.04. Juvenile courts; temporary custody of minors under the age of eighteen; release required within forty-eight hours unless complaint or petition filed; exceptions; violations; penalty. Whenever a minor under the age of eighteen years is detained under the provisions of section 43-205.03, such minor shall be released, within forty-eight hours after having been taken into custody, excluding nonjudicial days, unless within such period of time (1) a petition has been filed alleging that such minor has violated an order of the juvenile court, (2) a petition has been filed pursuant to the provisions of section 43-205, or (3) a criminal complaint against him has been filed in a court of competent juris-

diction, and except when a criminal complaint is filed, an order continuing detention until the adjudication hearing, after a reasonable showing that the necessity for detention still exists, is entered by the juvenile court.

This section shall not apply to a minor who has escaped from a commitment, or to a child who has been taken into custody for his own protection pursuant to subdivision (3) of section 43-205.01, in which latter case the child shall be held for a reasonable time. Any person who knowingly holds a child in detention in violation of any of the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars; or be imprisoned in the county jail for a period not to exceed thirty days.

43-205.05. Juvenile courts; temporary custody of minor; taken before juvenile judge promptly. Unless sooner released, a minor taken into custody under the provisions of sections 43-205.01 to 43-205.05 shall be brought before a judge of the juvenile court for an adjudication hearing as soon as possible after a petition has been filed. If the minor is not brought before a judge of the juvenile court within a reasonable period of time, he shall be released from custody.

43-205.06. Juvenile court; minor under eighteen years; right to counsel; appointment. When any minor under eighteen years of age shall be brought without counsel before a juvenile court within the meaning of Chapter 43, article 2, the judge shall advise such minor and his parents or guardian of their right to retain counsel and shall inquire of such minor and his parent or guardian as to whether they desire to retain counsel. The judge shall inform such minor and his parent or

guardian of their right to counsel at county expense if none of them is able to afford counsel. If the minor or his parent or guardian desire to have counsel appointed for such minor, or the parent or guardian of such minor cannot be located, and the judge ascertains that none of such persons are able to afford an attorney, the judge shall forthwith appoint an attorney to represent such minor for all proceedings before the judge in the juvenile court.

43-205.07. Juvenile court; minor under eighteen years; counsel; fees; allowance. Counsel appointed as provided in section 43-205.06 shall apply to the court before which the proceedings were had for fees for services performed. The court upon hearing the application shall fix reasonable fees. The county board of the county wherein the proceedings were had shall allow the account, bill or claim presented by any attorney for services performed under section 43-205.06 in the amount determined by the court. No such account, bill, or claim shall be allowed by the county board until the amount thereof shall have been determined by the court.

43-206. Juvenile court; issuance of process; summons; subpoena. (1) Upon the filing of the petition, a summons with a copy of the petition attached shall issue requiring the person who has custody of the child or with whom the child may be to appear personally and, unless the court orders otherwise, to bring the child before the court, at the time and place stated.

(2) If the petition alleges that the minor is a delinquent child or a child in need of special supervision, a summons, with a copy of the petition attached, shall also be served on said minor requiring him to appear personally at the time and place stated.

(3) If the person so summoned is other than a parent or guardian of the child, then the parent or guardian or both, if their residence is known, shall also be notified of the pendency of the case and of the time and place appointed; if there is neither a parent nor guardian, or if his or her residence is not known, then some relative, if there be one and his residence is known, shall be so notified; *Provided*, in any case the judge may appoint some suitable person guardian ad litem to act in behalf of the child.

(4) No summons or notice shall be required to be served on any person, except as required by subsection (2) of this section, who shall voluntarily appear before the court and whose appearance is noted on the records thereof.

(5) If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may, by endorsement upon the summons, order the officer serving it to take the child into custody at once.

(6) Subpoena may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

43-206.01. Juvenile court; service of process; manner; time; by whom made. (1) Service of summons shall be made by the delivery of a copy thereof to the person summoned or by leaving one at his usual place of residence.

(2) Notice, when required, shall be given in the following manner:

(a) If the person to be notified resides in the county where the action is pending, by delivery of a copy thereof to the person to be notified or by leaving it at his usual place of residence;

(b) If the person to be notified resides outside or has left the county where the action is pending, by mailing a copy thereof by registered or certified mail to the last-known address of such person; or

(c) If after reasonable inquiry, the whereabouts or an address of the parent, guardian or a relative cannot be ascertained, the court may publish a notice in a newspaper of general circulation in the county in which the proceeding is pending. The published notice shall simply state that a proceeding concerning the child is pending in the court and that an order making an adjudication and disposition will be entered therein. If the names of one or both parents or the guardian are unknown, he or they may be notified as the parent or parents, or guardian of (naming or describing the child) found (stating address or place where the child was found). Such notice shall be published once each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

(3) Personal or residence service shall be effected at least twenty-four hours before the time set for the hearing. Registered or certified mail shall be mailed at least five days before the time of the hearing.

(4) Service of summons, notice or subpoena may be made by any suitable person under the direction of the court.

43-206.02. Juvenile court; failure to appear; warrant; custody of child pending adjudication. If the person summoned or subpoenaed as provided in sections 43-206 to 43-206.04, shall without reasonable cause fail to appear and abide the order of the court or bring the child, he may be proceeded against as in the case of contempt of court. In case the summons cannot be served or the parties served fail to obey the same, and

in any case when it shall be made to appear to the court that such summons would be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of a child, or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as legally may be, the court shall proceed to hear and dispose of the case as provided in section 43-206.03; *Provided*, that the hearing shall not be had until there is before the court the minor when charged under subdivisions (4) and (5) of section 43-201, and in all cases the minor's custodian or person with whom he may be, parent or guardian, or, if they fail to appear, a guardian ad litem.

Pending the adjudication of any case, the child may be retained a reasonable period of time on order of the court in the possession of either the person having the charge of the same or some other suitable person, or may be kept in some suitable place provided by the city or county authorities or given to any proper and accredited charitable institution; *Provided*, the court may order such child examined by a physician, surgeon, psychiatrist or psychologist.

43-206.03. Juvenile court; hearings; adjudication; effect. (1) The hearing as to a child in custody of the probation officer or the court shall be held as soon as possible after the petition is filed, and as to a child not in such custody as soon as practicable after the petition is filed.

(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts.

(3) At the hearing the court shall first consider only

the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child.

(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment.

43-206.04. Juvenile court; files; how kept; certain reports and records not open to inspection without order of court. (1) The juvenile court judge shall keep a minute book in which he shall enter minutes of all proceedings of the court in each case, including appearances, findings, orders, decrees and judgments, and any evidence which he feels it is necessary and proper to record. Juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, certificates or receipts of mailing, minutes of the court, findings, orders, decrees, judgments and motions.

(2) The medical, psychological, psychiatric and social welfare reports and the records of juvenile probation officers as relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court.

43-207. Chief and assistant probation officers; appointment; qualifications; duties; salaries. The judge of the district court having charge of the juvenile docket shall have authority to appoint or designate one or more persons of good character, to serve as probation officers during the pleasure of the court. If two or more are appointed, at least one shall be a woman. They shall receive their actual expenses incurred and salaries to be fixed by the district judge making the appointment, with the approval of the county board, to be paid by the county the same as the salaries and expenses of other county employees are paid. The county judge in counties having a population of fifty thousand inhabitants, or less, may appoint one or more persons to serve as probation officers during the pleasure of the court; such probation officer or officers shall receive salaries to be fixed by the county judge making the appointments with approval of the county board, to be paid as other county officers are paid in such counties; *Provided,* that the county judges of two or more adjoining counties may, by agreement, appoint a juvenile probation officer to serve under the joint direction of the judges so agreeing; such officer shall receive his actual expenses incurred and a salary to be fixed by the appointing judges with approval of the respective county boards, to be paid by the respective counties served in proportions determined by said judges based on the populations of the respective counties. Juvenile probation officers shall be selected with reference to their experience and understanding of prob-

lems of family life and child welfare, juvenile delinquency, and community organization. Such officers shall perform the duties prescribed in this act for probation officers and such other duties as may be required by the judge of the juvenile court. In case a juvenile probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said juvenile probation officer in advance when any child is to be brought before the said court. It shall be the duty of said juvenile probation officer (1) to make such investigations as may be required by the court, (2) to be present in court to represent the interests of the child when the case is heard, (3) to furnish to the court such information and assistance as the judge may require, (4) to take such charge of any child before and after trial as may be directed by the court, and (5) to maintain complete case records on each child assigned to him. The county board shall provide for the payment, out of the general fund, of the actual expenses of the juvenile probation officers incurred in the performance of their duties prescribed by this act or under the order or direction of the court.

43-208. Dependent or neglected children; custody; maintenance; payments for support. When any child under the age of eighteen years shall be adjudicated to be a dependent or neglected child within the meaning of this act, the court may permit such child to remain in its own home subject to supervision or may make an order committing the child to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive it embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children, which association shall have been

accredited as hereinafter provided, (4) care of a suitable family; *Provided*, that under subdivisions (1), (2), (3), or (4) of this section upon a determination by the court that there are no private or other public funds available for the care, custody and maintenance of a child, the court may order a reasonable sum for the care, custody and maintenance of the child to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the child without such payment; or (5) care and custody of the Department of Public Welfare.

43-209. Neglected, dependent or delinquent children; guardianship; adoption; powers of custodian designated by the court; visitation; reports. In any case where the court shall award a child to the care of the Department of Public Welfare, an association, or individual, in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward and be subject to the guarianship of the department, association, or individual to whose care it is committed, which association and Department of Public Welfare shall have authority by and with assent of the court to place such a child in a suitable family home or institution. Such guardianship shall not include the guardianship of any estate of the child. Facts may also be set forth in the original petition, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights. After a petition, a supplemental petition, or motion has been filed, the court shall cause to be endorsed on the summons and notice that the proceeding is one to terminate parental rights, shall set the time and place for the hearing, and shall cause summons and notice, with a copy of the petition, supple-

mental petition, or motion attached, to be given in the same manner as required in other cases before the juvenile court.

The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist:

(1) The parents have abandoned the child for six months or more immediately prior to the filing of the petition;

(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;

(3) The parents, being financially able, have willfully neglected to provide the child with the necessary subsistence, education or other care necessary for his health, morals or welfare or have neglected to pay for such subsistence, education or other care when legal custody of the child is lodged with others and such payment ordered by the court;

(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child;

(5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; or

(6) Following upon a determination of neglect or

dependency, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

When termination of the parent-child relationship is sought under subdivision (5) of this section, the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may, in any other case, appoint a guardian ad litem, as may be deemed necessary or desirable, for any party. The guardian ad litem shall be paid a reasonable fee set by the court and paid from the general fund of the county.

When the parental rights have been so terminated and the care of such child is awarded to the Department of Public Welfare, the department shall have authority to consent to the legal adoption of such child and no other consent shall be required to authorize any court having jurisdiction to enter a legal decree of adoption of such child. When the care of such child is awarded to an individual or association and the parental rights have been terminated by the juvenile court, such individual or association may consent, only when authorized by order of such juvenile court, to the legal adoption of such child and no other consent shall be required to authorize any court having jurisdiction to enter a legal decree of adoption of such child; *Provided*, the Department of Public Welfare, an individual, or an association to whom the care of a child has been committed by a juvenile court prior to July 13, 1967, shall have authority to consent to the legal adoption of such child, without an order terminating parental rights. An order terminating the parent-child relationship shall divest the parent and child of all legal rights, privileges, duties and obligations with respect to each other and the parents shall have no rights of inheritance with respect to such child. The order terminat-

ing parental rights shall be final and may be appealed in the same manner as other final judgments of a juvenile court.

The custodian appointed by a juvenile court shall have charge of the person of the child and the right to make decisions affecting the person of the child, including medical, dental, surgical or psychiatric treatment; *Provided*, consent to a child marrying or joining the armed forces of the United States may be given by a custodian, other than the Department of Public Welfare, with approval of the juvenile court, or by the department, as to children in its custody, without further court authority. The authority of a custodian appointed by a juvenile court shall terminate when the individual under legal custody reaches twenty-one years of age, is legally adopted, or the authority is terminated by order of the juvenile court. When an adoption has been granted by a court of competent jurisdiction as to any such child, such fact shall be reported immediately by such custodian to the juvenile court. If the adoption is denied the jurisdiction over the child shall immediately revert to the court which authorized placement of the child for adoption. Any association or individual receiving the care or custody of any such child, shall be subject to visitation or inspection by the Department of Public Welfare, or any probation officer of such court or any person appointed by the court for such purpose, and the court may at any time require from such association or person a report or reports containing such information or statements as the judge shall deem proper or necessary to be fully advised as to the care, maintenance, moral and physical training of the child, as well as the standing and ability of such association or individual to care for such child. Except where the care of the child is awarded to the Department of Public Welfare, together with termination of parental rights, or the child has been legally adopted,

the jurisdiction of the court shall continue over any child brought before the court, or committed under the provisions of this act, and the court shall have power to order a change in the custody or care of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change.

43-210. Delinquent children; adjudication; alternatives given to court for disposition of case. When any child is adjudicated to be a delinquent child, the court may:

(1) Continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged when the same is in the interest of the child's reformation or rehabilitation and, subject to the further order of the court, may:

(a) Place the child under the supervision of a probation officer;

(b) Permit said child to remain in its own home, subject to the supervision of the probation officer; or

(c) Cause the child to be placed in a suitable family home or institution, subject to the friendly supervision of the probation officer, *Provided*, that under subdivision (1)(a), (1)(b), or (1)(c) of this section upon a determination by the court that there are no private or other public funds available for the care, custody and maintenance of a child, the court may order a reasonable sum for the care, custody and maintenance of the child to be paid out of a fund which shall be appropriated annually by the county where the petition is filed, until a suitable provision may be made for the child without such payment; or

(2) The court may commit such child to the care and custody of the Department of Public Institutions.

43-210.01. Child in need of special supervision; orders permitted; commitment to Department of Public Institutions, when. When any child is found by the court to be a child in need of special supervision as defined by subdivision (5) of section 43-201, the court may enter such order as it is empowered to enter in the case of a delinquent child except that no such child shall be committed to the Department of Public Institutions until the court shall find:

(1) That said child has failed to make a satisfactory adjustment after a reasonable period of time under its original order; or

(2) Such commitment is necessary in the first instance for the protection of the health and welfare of said child or of society.

43-210.02. Juvenile court; commitment of children subject to act; hospital treatment; custody in state institutions; discharge. The court may, when the health or condition of any child within the terms of this act shall require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in an accredited and suitable private hospital or institution which will receive it for like purposes. If the court finds any such child to be feeble-minded as defined by section 83-219, it may, upon attaching the physician's certificate and the report as to the mental capacity provided by section 83-221, commit said child directly to the Beatrice State Home.

In no case shall a child committed under the terms of sections 43-201 and 43-202, sections 43-204 to 43-220, and sections 43-210.01 to 43-210.03 be confined after he

or she shall have reached the age of twenty-one years. The marriage of any child committed to a state institution under the age of twenty-one years shall not make such child of the age of majority. A child committed to any such institution shall be subject to the control of the superintendent thereof, and the said superintendent, with the advice and consent of the Department of Public Welfare or the Department of Public Institutions, whichever has supervision of the institution shall adopt bylaws for the promotion, paroling and final discharge of inmates such as shall be considered mutually beneficial for the institution and the inmates; *Provided*, upon final discharge of any inmate such department shall file a certified copy of the discharge with the court which committed said inmate.

43-210.03. Juvenile court; award of custody of child to other than parent; support of child; appropriation by county; liability of parents; proceedings to enforce. Whenever the care or custody of a child is given by the court to someone other than his parent, or when a child is given medical, psychological or psychiatric study or treatment under order of the court, and no provision is otherwise made by law for the support of the child or for payment for such study or treatment, compensation for the study and treatment of the child, when approved by order of the court, shall be paid out of a fund which shall be appropriated annually by the county where the petition is filed. In the same or subsequent proceeding, after summons to the parent of the time and place of hearing thereof as provided in section 43-512, the court may order and decree that the parent shall pay, in such amount as the court may direct, a reasonable sum that will cover in whole or in part the support, study and treatment of the child given after the decree is entered, which amount ordered

paid shall be the extent of the liability of the parent. The court in making such order shall give due regard to the cost of study, treatment and maintenance of the child and the ability of the parent to pay. Amounts thus received shall be transmitted to the person, agency or institution furnishing such study, treatment or maintenance and if a state agency or institution, transmitted by it quarterly to the Auditor of Public Accounts for credit to the proper fund. If the parent willfully fails or refuses to pay such sum, the court may proceed against him as for contempt. If execution shall issue at the request of any person, agency or institution treating or maintaining said child. The court may afterwards, because of a change in circumstances of the parties, revise or alter the order of payment for such study or treatment.

§ 43.211. Children under sixteen charged with crime; transfer from justice and police courts to juvenile court. When in any county where a juvenile court is held, as provided in section 43.201, a child under the age of sixteen years is arrested with or without a warrant, such child may, instead of being taken before a justice of the peace or police magistrate, be taken directly before such court; or if the child is taken before a justice of the peace or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court and the officer having the child in charge to take the child before that court. In any case the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon complaint or affidavit as herein provided. In any case the court shall require notice to be given and investigation to be made as in other cases under this act and may adjourn the hearing from time to time for that purpose.

43-212. Children under fourteen charged with crime; custody; detention; prohibitions; children under sixteen; detention; prohibitions. When a child under fourteen years of age is taken into custody the court or magistrate may place such child in the care of the sheriff, police officer or probation officer or other suitable person as the court or magistrate shall direct, who shall keep such child in some suitable place outside of the enclosure of any jail or police station. When any child under the age of sixteen years shall be detained in any institution to which adults are sentenced, it shall be unlawful to permit such child to have verbal, visual, or physical contact with such adults at any time.

43-213. Neglected, dependent or delinquent children; confinement; parole; Director of Public Institutions; duties; Parole and Group Home Unit; created. It shall be the duty of the Director of Public Institutions to maintain an agent of the Department of Public Institutions, whose duty it shall be to examine the homes of children paroled from institutions under its jurisdiction, for the purpose of ascertaining and reporting to the department whether they are suitable homes, to assist children paroled or discharged from such institutions or placed in foster or group homes in finding suitable employment, and to maintain a friendly supervision over paroled inmates during the continuance of their paroles. To administer the provisions of sections 43-213, 83-108.04, 83-465 and 83-472, the Director of Public Institutions shall appoint a supervisor of the Parole and Group Home Unit, which is hereby created, and such other parole officers as are necessary to carry out the purposes of sections 43-213, 83-108.04, 83-465 and 83-487.

43-214. Association receiving children; supervision by Department of Public Welfare; reports; statements.

All associations receiving children under this act shall be subject to the same visitation, inspection and supervision by the Department of Public Welfare as are the public charitable institutions of this state, and it shall be the duty of the department to pass annually upon the fitness of every such association as may receive or desire to receive children under the provisions of this act. Every such association shall annually, at such time as the department shall direct, make report thereto, showing its condition, management and competency to adequately care for such children as are or may be committed to it, and such other facts as the department may require. Upon the department being satisfied that such association is competent, and has adequate facilities to care for such children, it shall issue to the same a certificate to that effect; which certificate shall continue in force for one year, unless sooner revoked by the department. No child shall be committed to any such association which shall not have received such a certificate within fifteen months next preceding the commitment. The court may at any time require from any association receiving or desiring to receive children under the provisions of this act such reports, information and statements as the judge shall deem proper and necessary for his action, and the court shall in no case be required to commit a child to any association whose standing, conduct or care of children or ability to care for the same is not satisfactory to the court.

43-215. Neglected or dependent children; surrender by parents, etc., to institutions authorized; agreements; contents; effect. It shall be lawful for the parents, parent, guardian of any child, or other person having the right to dispose of a dependent or neglected child to enter into an agreement with any association or in-

stitution incorporated under any public or private law of this state or any other state, for the purpose of aiding, caring for, or placing such children in homes and, subject to approval as herein provided, to surrender such child to such association or institution, to be taken and cared for by such association or institution, or put into a family home. Such agreement may contain any and all proper stipulations to that end, and may authorize the association or institution by its attorney or agent to appear in any proceeding for the legal adoption of such child, and consent to its adoption; and the order of the court, made upon such consent, shall be binding upon the child and its parents or guardian, or other person, the same as if such person were personally in court and consented thereto, whether made party to the proceeding or not. All the publication or notice necessary for the adoption of any such children shall be that the institution or parties having charge of such children by court decree, or to whom a relinquishment of the child was given shall know that such legal adoption is being made.

43-216. Commitment of children; religious preference considered. The court in committing children under the provisions of this act shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of the child, or with some association which is controlled by persons of like religious faith of the parents of the child.

43-217. Industrial schools; laws applicable. Nothing in this act shall be construed to repeal any portion of the act to aid industrial schools for girls and boys.

43-218. Act, how construed. This act shall be liberally construed to the end that its purpose may be

carried out, namely, that the care, custody and discipline of a dependent, neglected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all cases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise.

43-219. County board of visitors; appointment; duties; reports; expenses. In each county the judge presiding over the juvenile court, as defined by this act, may appoint a board of four reputable inhabitants, who shall serve without compensation, to constitute a board of visitation, whose duty it shall be to visit as often as once a year, all institutions, societies and associations within the county, receiving children under this act. Visits shall be made by not less than two of the members of the board, who shall go together or make a joint report. The board of visitors shall report to the court, from time to time, the condition of children received by or in the charge of such associations and institutions, and shall make an annual report to the Department of Public Welfare and Department of Public Institutions in such form as each of the departments may prescribe. The county board may, in its discretion, make appropriations for the payment of the actual and necessary expenses incurred by the visitors in the discharge of their official duties.

43-220. Detention homes; power of county boards to provide. The several county boards of counties of Nebraska shall have the power and authority to appropriate the funds necessary to establish and maintain detention homes in connection with the juvenile courts of this state.

25-1937. Appeals; when right conferred but fails to prescribe procedure. When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. Appeals from the district court to the Supreme Court shall be taken in the same manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 15

CLARENCE DeBACKER,
Appellant,

v.

HOMER BRAINARD,
Sheriff of Dodge County, Nebraska,
Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

MOTION OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 15

CLARENCE DeBACKER,
Appellant,

v.

HOMER BRAINARD,
Sheriff of Dodge County, Nebraska,
Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

MOTION OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

The National Council of Juvenile Court Judges* moves the Court, pursuant to Rules 35 and 42(3), for leave to file a brief *amicus curiae.* For supporting grounds the *amicus* states that:

1. Appellant has refused consent for the filing of an *amicus curiae* brief by the Council.

2. The National Council of Juvenile Court Judges is an unincorporated association. More than 1,000 of its members

*Hereinafter usually referred to as the "Council."

are judges of the various States of the Union and the District of Columbia vested with jurisdiction to determine juvenile cases. The judge members of the Council handle approximately 90% of the juvenile cases filed in the nation's courts each year.

3. A fundamental tenet of the Council is that juvenile courts are courts of law, and not social agencies. From its inception a primary concern of the Council has been that both statutory and decisional law should constantly be studied and examined, to the end that due process of law and essential fairness to the troubled children who come before the court should not be thwarted by displacing justice to the individual child with procedural simplicities which can easily lead to arbitrariness. Still, from time immemorial children have necessarily been subjected to restraints from which adults are free. As a consequence, the judges of the juvenile courts of the nation must daily deal with the practical legal problems and complexities to which this gives rise. It has therefore become the practice of juvenile court judges to seek to place at the service of legislatures and courts of last resort their collective knowledge and experience, in the hope of illuminating areas which are not always fully understood by attorneys, most of whom rarely practice in the juvenile court.

4. The Council's basic interest in this cause is that a long-tested and enlightened system for the administration of justice for juveniles, and a system which adheres to standards of fundamental fairness, not be jeopardized by an automaton insistence that the best interests, including adequate protection of basic constitutional rights, of children who are not charged with crimes can only be realized by treating them as if they were adults and so charged.

5. The broader interests of the Council are fortuitously allied with the understandably more specific concerns of the appellee in this case. This does not suggest or imply, however, that the *amicus* espouses any position on the more narrow question of the absolute correctness of the

adjudication of delinquency involved in this case. The *amicus* appears in this Court solely for the purpose of attempting to present the collective knowledge and experience of its members on issues of obvious importance to the future operation and development of juvenile court justice in the United States.

6. The *amicus* also suggests that the troublesome issues, and possibly far-reaching consequences that may flow from resolution of those issues, which the Court is asked to decide in this case are not ripe for final determination on the basis of the record now before the Court. It appears that the points which the *amicus* raises in this regard have not been and will not be argued by either the appellant or appellee.

7. First, *Duncan v. Louisiana*, 391 U.S. 145 and *Bloom v. Illinois*, 391 U.S. 194, the major cases on which the appellant most strongly relies to support his claim of a jury trial under the Sixth Amendment, as now incorporated in the Fourteenth Amendment, were decided subsequently to the juvenile court hearing and verdict in this case. In *DeStephano v. Woods*, 392 U.S. 631, this Court held that its rulings in *Duncan* and *Bloom*, *supra*, on which the appellant stands, are not to be given retroactive application, so far as jury trials in adult criminal courts are concerned. It is, then, unlikely that the Court would wish retroactively to extend application of the principle of those two cases to a juvenile court hearing and adjudication occurring before they were decided after refusing to give them retroactive effect in criminal trials generally.

8. Secondly, it would appear that the question of the prosecutor's discretion not to institute proceedings in an adult criminal court was not considered by the Nebraska Supreme Court and, therefore, should not now be considered by this Court on the basis of the barren record below. Moreover, it also may be that under Nebraska law, the exercise of prosecutor discretion of which appellant complains is subject to judicial review.

9. The *amicus*, therefore, believes that the integrity of this Court's appellate jurisdiction would be best served by vacating the order noting probable jurisdiction and remanding the case to the Supreme Court of Nebraska. Certainly, the important questions which the appellant prematurely presses upon it for decision in this case will return to the Court for resolution in the near future. It will be time enough then to decide them, especially under circumstances where their resolution can be achieved in the context of a full record, unmarred by possible jurisdictional deficiencies, including the troublesome issue of the non-retroactive application of constitutional decisions, and a record which at the same time could present a comprehensive exposition of the impact of any decision of such issues by the Court on the administration of the juvenile court systems of the nation.

10. Should, however, the Court move to a decision on the issues presented by the appellant, the *amicus* urges that the twin goals of affording due process in juvenile court proceedings and at the same time preserving the reformative and rehabilitative goals of modern juvenile court systems can best be achieved by not requiring a jury trial in juvenile proceedings and by not denying a prosecutor the discretion to elect to proceed against a child as a juvenile and not as a criminal.

11. Counsel for the appellee have advised the *amicus* that they do not oppose this motion. Counsel for the

appellant has stated that he reserves the right to object to it.

Respectfully submitted,

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July 17, 1969

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 15

CLARENCE DeBACKER,
Appellant,

v.

HOMER BRAINARD,
Sheriff of Dodge County, Nebraska,
Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

INTRODUCTORY STATEMENT

The facts of this case, the pertinent Nebraska statute, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the appellant and appellee. The *amicus* accepts them for purposes of its own motion and brief.

QUESTIONS PRESENTED

A. *The Issues Raised by Appellant.* The appellant poses three questions, all of which he alleges to be of constitu-

tional dimension. The *amicus* deals with only two of the three issues thus raised by the appellant.[1] Restated in the order in which *amicus* will discuss them in this brief and paraphrased purely for the purpose of succinctness, these two issues are:

1. Do the Fourteenth and Sixth Amendments to the Federal Constitution require a trial by jury of a juvenile in a juvenile court for an offense which, if committed by an adult, would require a jury trial if requested?

2. Does the Due Process Clause of the Fourteenth Amendment prohibit prosecutors from exercising a discretion, not judicially reviewable, to determine that a juvenile shall be tried in a juvenile court rather than bringing criminal proceedings against him in an adult court?

B. *Two Additional Questions.* In addition to the above stated questions, the *amicus* suggests that there are two

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[1] The *amicus* does not speak to the burden of proof issue, the second of the three questions presented by the appellant. First, the constitutional aspects, if any, of this issue somewhat elude us, obscured as they are by differences which may be more semantic in nature than true distinctions of fact or result. Secondly, the *amicus* understands the burden of proof standard to be a rule of procedure and evidence, not a constitutional requirement. See *Davis v. United States*, 160 U.S. 469, 488 and *Leland v. Oregon*, 343 U.S. 790, 797. Thirdly, the Supreme Court of Nebraska has demonstrated that it will utilize its authority to review the sufficiency of evidence to support an adjudication of delinquency to preserve the presumption of innocence in favor of the alleged delinquent and will require a showing of the "moral certainty" of the juvenile's guilt. *Guy v. Doeschot*, 183 Neb. 557, 162 N.W.2d 524, 525 (1968), a case decided by the Nebraska Supreme Court subsequently to its decision in this case. The appellant in the case at bar, however, chose to follow the *habeas corpus* route rather than taking a direct appeal from the ruling of the juvenile court and thus never raised the sufficiency of evidence issue in the Supreme Court of Nebraska. Finally, if the *amicus* is correct in maintaining that the substantive issues regarding jury trial and prosecutor's option are not ripe for determination by the Court on the present record, the burden of proof question becomes even more unsubstantial as a constitutional question meriting a decision by the Court at this time and in this case.

other issues, both quasi-jurisdictional in nature, which the Court might first desire to resolve. Neither was considered below, but both, we believe, are threshold questions upon which the Court should pass before it takes up the substantive issues raised in the appellant's brief. The two questions are:

1. Whether the right to trial by jury, as guaranteed by the Sixth Amendment and now extended to state court criminal proceedings by virtue of this Court's decision in *Duncan v. Louisiana*, 391 U.S. 145, should be applied *retroactively* to a juvenile court proceeding which was commenced, decided and the available avenue of direct review from which had been deliberately not pursued, prior to May 20, 1968, the date of the *Duncan* decision?

2. Should the issue of the prosecutor's election to proceed against a child as a juvenile in a juvenile court, rather than as a criminal in an adult criminal court, be decided on the basis of the present record, when the Nebraska Supreme Court did not pass upon the issue, where the point loses any potency it might otherwise possess if the Court should agree that the doctrine of *Duncan v. Louisiana, supra*, should not be retroactively applied, and where the exercise of such discretion by the prosecutor might have been subject to judicial review under a state statute which appellant, however, did not invoke?

SUMMARY OF ARGUMENT

I.

Appellant asks this Court to apply the jury trial right in adult criminal causes first enunciated on May 20, 1968, in *Duncan v. Louisiana*, 391 U.S. 145, to this juvenile hearing which transpired some two months prior to the decision in *Duncan*. *Amicus* maintains that the decision of this Court on June 17, 1968 in *DeStefano v. Woods*, 392 U.S. 631 (1968) is an absolute bar to the retroactive application of *Duncan* not only in criminal proceedings but in this juvenile action as well. In support of that position, it is argued

that it would be both unjust (to adult criminals) and anomalous for juveniles to be afforded constitutional rights in a juvenile proceeding to which they would not have been entitled if they had been tried in the criminal courts as an adult. Further, the basic standards upon which the issue of retroactivity turns clearly dictate non-retroactive application of any jury trial right found to exist. Finally, to announce the retroactive existence of a right to a jury trial would constitute a heavy and unnecessary blow to those thirty-four or more states which until now, in good faith reliance upon their constitutional right to do so, have denied juveniles a jury trial in juvenile court.

II.

A. The juvenile court should not be converted into just another inferior criminal court, negating the hope and the promise which motivated its creation and has stimulated its development. To enforce, in juvenile courts, all of the constitutional safeguards now existing for adults in criminal courts would be an unnecessary, undesirable and wholly unwarranted nullification of the rehabilitative ideal which permeates the juvenile court. The power of the state to control the conduct of children exceeds the scope of its authority over adults. *Ginsberg v. New York*, 390 U.S. 629, 638. Surely, then, juvenile courts can be maintained as courts of fairness as well as equity without the whole-scale assimilation of constitutional rights applicable in adult criminal proceedings. *In Re Gault*, 387 U.S. 1, 30, points the way, which is by the selective absorption into the juvenile court of only those constitutional rights which are so fundamental as to be indispensable to our scheme of ordered liberty. *Kent v. United States*, 383 U.S. 541, 562.

B. Due process is both a phrase and a fact. Its factual content is derived from a realistic appraisal of those rights which are so fundamental as to be of the essence of the American system of justice. The meaning of due process is illumined by an examination of the practices and policies which have become accepted by tradition and usage through-

out the states, *Duncan v. Louisiana*, 391 U.S. 145. On this analysis, the right to trial by jury is not so fundamental as to be required in the juvenile court. Thirty-four states currently operate their juvenile courts in the absence of a right to a jury trial. Even in those where the right is recognized, it is weakened by a non-usage approaching non-existence. *Juvenile Delinquents: The Police, State Courts, and Individualized Justice* (Note), 79 Harv. L. Rev. 775, 793-794 (1966).

Recent studies indicate that the jury is not demonstrably more able to arrive at just decisions under law than a judge acting as fact-finder and legal arbiter. Kalven and Zeisel, The American Jury 56 (1966). Nor has the jury been proved, in this age and place, to be in any other meaningful way a genuine, rather than a semantic, bulwark for the juvenile accused of criminal conduct against oppression, governmental or otherwise. It is not necessary to join forces with those who are broadside detractors of the right to trial by jury to recognize the weaknesses of the somewhat less than persuasive and undeserved plaudits of which the jury trial system is so often the benefactor.

Jury trials are required, by dint of *Duncan, supra,* in adult criminal proceedings for serious crimes. Like due process, the meaning of serious crimes is somewhat inexact and elusive. In one age, a serious crime is one punishable by a death without the right to burial. In another, it is one punishable by torture and cruelty. In our time, the seriousness of a punishment is not measured alone by the maximum duration of imprisonment. Penalties must be viewed in terms of alternatives. If the stigma of criminality is to some extent minimized, the severity of the punishment is reduced. If the adult criminal process would exact a heavier toll of incarceration than the juvenile court, then the severity of the juvenile process is lessened. And if the juvenile court's mechanism is not reasonably susceptible to the application of the petty-serious crime dichotomy, then it should not be introduced there. It is the *amicus'* position that the logic which has given the jury trial right a

commanding place in criminal cases is inapplicable in the context of the juvenile court in view of the nature of that court, its dispositional alternatives and the debatable merits of the jury trial right itself.

C. A decision announcing the existence of the right to trial by jury in juvenile court will immediately put in question other concomitants of the right to trial by jury, such as the necessity for a unanimous verdict of such a jury. *DeStephano v. Woods*, 392 U.S. 631; *Bloom v. Illinois*, 391 U.S. 195, 213 (Fortas, J. concurring). Rather than clarifying the status of constitutional rights in state juvenile courts, such an outcome would becloud the conduct of those proceedings even more, to the detriment of the court and, ultimately, the juvenile himself. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 192.

It is also very likely that to equate the juvenile court with a criminal trial for the purposes of incorporating constitutional rights will raise a host of issues concerning other processes, resulting in loss of liberty, like mental commitment procedures and dependency hearings, which will put such procedures either in doubt or in jeopardy.

Without offering any discernible benefit to the juvenile, trial by jury will inevitably result in a restructuring of the juvenile court after the criminal law model, with an infusion of time-consuming and expensive procedures which will delay the court, encourage strategic byplays by counsel and frustrate the efforts of the juvenile court to avoid fastening a stigma of criminality on the juvenile and upon its proceedings.

III.

A. Neither the trial court nor the Supreme Court of Nebraska passed upon appellant's contention that he was denied due process of the law when the prosecutor exercised an unreviewable discretion not to charge him as a criminal but to proceed against him in the juvenile court.

Appellant devoted *one* paragraph of his brief in the Supreme Court of Nebraska to this contention. *Cf. Beck v. Washington*, 369 U.S. 541, 553. His challenge to the prosecutor's discretion to waive criminal charges in favor of juvenile court proceedings transcends issues involving the administration of juvenile court justice and touches much broader areas of the permissible discretion of a prosecutor to institute, to reduce, or to not prosecute criminal proceedings generally. *Amicus* believes that the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which might support the announcement of a wide ranging new constitutional principle. *Powell v. Texas*, 392 U.S. 514, 521. The *amicus* suggests that, in view of the barren record made in the courts below and the importance of the issue which the Court is asked to resolve, the notation of probable jurisdiction in this case be treated as a grant of a writ of certiorari on the issue of the prosecutor's discretion and that the Court then dismiss the writ as improvidently granted. *Mishkin v. New York*, 383 U.S. 502, 512-514.

B. A statute of Nebraska provides that a judgment or order of an "officer exercising judicial functions" may be reviewed in the district court. Section 25-1901, Rev. Stat. of Neb. (1964). The statute has been construed to cover the actions of executive or administrative officials. *Pollack v. School District*, 54 Neb. 171, 74 N.W. 393 (1898). Under appellant's own analysis, the prosecutor was an "officer exercising judicial functions." Accordingly, his decision to proceed in the juvenile court, rather than in an adult criminal court, was reviewable under the statute cited. The appellant did not invoke that statute.

IV.

Appellant's claim that the prosecutor's decision to proceed against him in juvenile court offended due process is a singularly unique contention. The reported precedents dealing with the waiver question all involve challenges to a procedure through which a child was made subject to adult

criminal justice, rather than being proceeded against in a juvenile court. See, *e.g.*, *Kent v. United States*, 383 U.S. 541. The *amicus* agrees that a decision by which a child is made to stand trial in an adult criminal court is "in essence, a sentence of 'death' as a juvenile, with the subsequent proceedings in the criminal court completing the execution." Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 Ind. L.J. 583, 588. Here, the appellant complains because he was spared such a sentence. However, he takes pains to argue that if he had a right to a jury trial in the juvenile court, an unreviewable discretion on the part of the prosecutor to charge him in the criminal court would have been challenged on the ground that a juvenile should not be deprived of the dispositional advantages of the juvenile court "because of the prosecutor's whim."

Amicus believes the appellant's sophistical position on this issue is a reflection of his counsel's judgment that he might have won the case before a jury. We do not believe that due process requirements should be diluted, if not debased, by pressing them into service as substitutes for arguments or appeals attacking the sufficiency of evidence supporting a verdict – a contention which the appellant eschewed when he chose to proceed by *habeas corpus*, rather than by direct appeal ultimately to the Supreme Court of Nebraska, as he could have done.

A number of states give concurrent jurisdiction over juveniles to their criminal and juvenile courts. The Attorney General of the United States is given discretionary authority, analogous to that involved in this case, by the Federal Juvenile Delinquency Act, 52 Stat. 557 (1948); 18 U.S.C. 5032 (1969). The Attorney General's authority has been sustained in several cases. See, *e.g.*, *Raimirez v. United States*, 238 F. Supp. 763, 764 (S.D. N.Y., 1965). The purpose of the Federal Juvenile Delinquency Act is the same as that which underlies the Nebraska statute challenged on this appeal, *i.e.*, to "avoid prosecution of juveniles as criminals." *Cotton v. United States*, 355 F.2d 480,

481 (C.A. 10, 1966); *Miller v. Bryant*, 94 Neb. 754, 144 N.W. 804 (1913).

We find nothing in *Kent v. United States*, 383 U.S. 541, which throws doubt on the type of discretion which the prosecutor exercised in this case. In *Kent* the Court was dealing with a situation in which a child was charged as a criminal to be tried in a criminal court, not, as in the instant case, reviewing a decision in favor of treating a child as a juvenile rather than as a criminal. Secondly, it is doubtful that *Kent* is a case of constitutional dimension. 383 U.S., at 556. Even if it must be taken as a decision with constitutional overtones, the Court there was confronted with the interpretation of a statutory provision which laid a judicial, or at least a quasi-judicial, function on a judicial tribunal, *i.e.*, a determination by a juvenile court "after full investigation" to waive its "exclusive jurisdiction." 11 D.C. Code 907, 914 (1961). It is well settled law that, where a quasi-judicial proceeding or hearing is required by statute as a prelude to an adjudication affecting legal rights, the procedures observed must observe due process. *Morgan v. United States*, 304 U.S. 1, *Greene v. McElroy*, 360 U.S. 474. Nebraska, however, has not vested any authority in its juvenile courts to waive jurisdiction; it permits juvenile court jurisdiction to exist concurrently with that of the regular criminal courts. Election of the jurisdiction in which to proceed against a juvenile remains an executive or prosecutor's responsibility.

Amicus believes it would be an unjustified and invidious extension of the *Kent* case to maintain that it requires the exercise of a prosecutor's discretion in choosing to proceed against a child in a juvenile court either to be preceded by some type of quasi-judicial hearing or else be subject to subsequent judicial review. If the *amicus* is wrong in that reading of *Kent*, and the discretion exercised by the prosecutor in this case be made subject to judicial review, then other, even more critical, categories of prosecutor's discretion traditionally thought to be immune from judicial scru-

tiny will be exposed to such scrutiny. We do not share the concern of a distinguished commentator that the *Kent* decision might be regarded as a portent looking "toward such radical innovation as to implant an adversary hearing in all decision-making that may work 'a result of tremendous consequences' to individuals in respect to their freedom . . . ." There are others, however, who would move the Court in precisely that direction: Davis, Discretionary Justice, A Preliminary Inquiry (La. State Univ. Press, 1969).

Awesome consequences could ensue should this Court extend the ruling in *Kent* to strike down the discretion which the prosecutor has exercised in this case. Surely, there are limits to "government by lawsuit." There is a practical, as well as a philosophical, basis for the separation of powers doctrine. *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270. To uphold appellant's contention that the prosecutor could not decide to treat him as a juvenile, rather than as a criminal, unless he held a hearing before so deciding or his decision be made subject to subsequent judicial review, is to cut away severely at both bases of the doctrine.

ARGUMENT

I.

NO JURY TRIAL RIGHT EXISTED AT THE TIME OF THE HEARING IN THE JUVENILE COURT

Appellant was not entitled to a jury trial at the time of his juvenile court hearing because: *Duncan v. Louisiana*, 391 U.S. 145, had not yet been decided; the later decision in *DeStefano v. Woods*, 392 U.S. 631, precludes the retroactive application of *Duncan*; the juvenile courts of thirty-four or more jurisdictions were at the time of appellant's hearing justifiably relying on their right to deny a jury trial to juveniles in juvenile courts; and appellant was not at the time of his juvenile court hearing thus entitled to a jury trial if tried as an adult in a criminal court.

It is clear, since this Court's decision in *Duncan v. Louisiana, supra,* that the Sixth Amendment's right to trial by jury in criminal prosecutions is binding upon state criminal proceedings, at least where they are of a serious character. In light of *DeStefano v. Woods, supra,* it is also indisputable that the decision in *Duncan* will apply prospectively only. This Court, in *DeStefano,* defined the meaning of prospectively in such a way as to give the rule in *Duncan* force only as to criminal trials begun on or after May 20, 1968—the date of the decision in *Duncan.*

Counsel for the appellant bases his argument for a reversal of the holding of the Nebraska Supreme Court almost exclusively upon the Court's opinions in *Duncan* and in *Bloom v. Illinois,* 391 U.S. 194. As expressed in appellant's brief, it is argued that he has a right to a jury trial in the juvenile court since "the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court." However, *DeStefano v. Woods,* 392 U.S. 631 (1968), in denying retroactive effect to a jury trial in criminal actions, effectively destroys the underpinnings of appellant's argument for a right to trial by jury in juvenile proceedings. *DeStefano* leaves no room for doubt that at the time of appellant's juvenile court hearing he had no constitutional right to a trial by jury in an adult criminal proceeding.

The record of the appeal reveals that all of the prior relevant proceedings occurred prior to the coming of *Duncan* and *Bloom.* The date of the offense charged to appellant was January 26, 1968 (A. 1);[2] the date of the petition in the Juvenile Court of Dodge County was February 15, 1968 (A. 1); the date of the Juvenile Court's adjudicatory hearing was March 28, 1968 (A. 3); the date of the Juvenile Court's order adjudicating appellant a delinquent was March 29, 1968 (A. 17); the date of the filing of the *habeas corpus* petition was April 3, 1968 (A. 18); and it was denied on April 10,

[2]References to the appendix containing the printed-record filed in this Court are designated herein as "(A. ___)."

1968 (A. 21). Thereafter, on May 20, 1968, this Court decided *Duncan* and *Bloom*, *supra*, both of which, as has been said, were determined in *DeStefano v. Woods* not to be retroactive in application. Consequently, the non-retroactivity of the right to a jury trial in a criminal cause should induce this Court to refrain from declaring that right to apply retroactively to a juvenile cause which preceded the date of its decisions in *Duncan* and *Bloom*.

The criteria to be employed in determining whether a newly established constitutional right is to be enforced retroactively were stated in *Stovall v. Denno*, 388 U.S. 293, 297, to be:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

It is to be noted, as Mr. Chief Justice Warren did in *Johnson v. New Jersey*, 384 U.S. 719, 728, that "the choice between retroactivity and non-retroactivity in no way turns on the value of the constitutional guarantee involved." And a failure to apply a constitutional rule retrospectively is not a denigration of any intrinsic or fundamental value that it might have in our constitutional system.

Under any reasonable analysis of these norms for determining retroactivity, the jury trial right should not be applied retroactively to this juvenile matter. The purpose of the right to a jury trial which derives from *Duncan* and *Bloom* cannot simply be to achieve an abstract state of justice. The right to a jury trial has attributes and vitality in the real world of criminal prosecutions and often, as in this cause, an impact to match. The facts in this case reveal no patent injustice to the appellant resulting from having the juvenile court judge act as the fact finder. In other words, "the fairness of the trial is not under attack." *Linkletter v. Walker*, 381 U.S. 618, 639.

An adjudicatory hearing was held at which testimony was introduced concerning the circumstances of the alleged

offense. An effort was made to divorce the adjudicatory phase from matters relating to the proper disposition of appellant. The juvenile court judge manifestly attempted, in a conscientious way, to ascertain whether the allegations of the petition were proved. There is, therefore, no self-evidently gross prejudice resulting from the lack of a jury trial in the juvenile court proceedings which needs to be righted by a retroactive application of the right to a jury trial to this cause and, as an inevitable consequence, to all other juvenile proceedings anywhere decided prior to *Duncan* and *Bloom*.

Furthermore, the impact upon the administration of juvenile justice from such retroactivity would be enormous. It should be a matter of some moment that many retrials, necessitated by such retroactivity, would not be feasible because juvenile court jurisdiction, in consonance with the *parens patriae* theory often considered to be its chief warrant, generally terminates when the juvenile reaches 21 years of age. Consequently, retrials in the juvenile court, with a jury, would be precluded in such cases. The available options, under such a situation, would be to dismiss the charges against those juveniles denied a jury trial who are above the age of twenty-one or to try them in a criminal court. Pursuit of the latter alternative might be prevented by a fear of the application of the Fifth Amendment's double jeopardy clause and, in other cases, barred because of a state's having given exclusive jurisdiction to a juvenile court over persons who at the time of an offense were under twenty-one years of age.

In addition, it is extremely important to be aware of the heavy reliance that the states' juvenile courts have heretofore placed upon their right to try juveniles in delinquency cases without a jury and without thereby infringing a juvenile's constitutional rights. A study of the statutes and judicial opinions on this question in the various states[3] indi-

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[3]At pages 12 and 13 of appellant's brief a student note from the Winter 1969 issue of the North Dakota Law Review is cited as

cates that thirty-four states at present clearly and definitively deny the juvenile a right to a jury trial in cases such as this.[4] Some twelve other jurisdictions (including the District of Columbia) grant that right, but then only upon

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authority for the proposition that 12 jurisdictions grant and 27 deny the right to a jury trial. However, that student note is too often incomplete or inaccurate for a firm reliance to be placed upon it. For example, it cites an Alaska statute for the proposition that a jury trial is permitted, when that statute explicitly denies such a jury trial. It fails to cite the relevant South Carolina statute and miscites the Colorado, Hawaii, West Virginia and New York statutes. *Amicus* has therefore made its own tabulation of the statutes and decisions, set out in the next footnote, which does not, however, embrace a thorough review of those states where an appeal might result in a trial *de novo* with a right to a jury trial. See, *e.g.*, Ann. Laws Mass., Ch. 119, Sec. 56 (1958).

[4] By statute in: Ala. Code Tit. 13, Sec. 369 (1969); Alaska Stat. 47.10.070 (1968 Supp.); Ariz. Rev. Stat. Ann., Sec. 8-229 (1956); Ark. Stat. Ann., Sec. 45-206 (1964 Repl.); Del. Code Ann. Tit. 10, Sec. 1175 (1966 Supp.); Fla. Stat. Ann. 39.09(2) (1961); Ga. Code Ann., Sec. 24-2420 (1959); Hawaii Rev. Stat., Sec. 571-41; Gen. Laws Idaho Ann., Sec. 16-1813; Ind. Ann. Stat., Sec. 9-3215 (1967 Burns' Supp.); Iowa Code Ann. 232.27 (1969 Supp.); Ky. Rev. Stat., Sec. 208.060 (1962); La. Rev. Stat. Ann., Sec. 13:1579 (1968); Minn. Stat. Ann., Sec. 260.155(1) (1967 Supp.); Miss. Code Ann., Sec. 7185-08 (1942); Vernon's Ann. Mo. Stat., Sec. 211.171(6) (equity practice controls); Neb. Rev. Stat., Sec. 43-206.03(2) (1943); Nev. Rev. Stat., Sec. 62.190(3) (1963); N.J. Stat. Ann. 2A:4-35 (1963); McKinney's Consol. Laws N.Y., Family Court Act 164, 165 and Civ. Prac. Law and Rules 4101; N.D. Century Code, Sec. 27-16-18 (1967 Supp.); Page's Ohio Rev. Code Ann., Sec. 2151.35 (1968 Repl.); Ore. Rev. Stat., Sec. 419.498(1) (1967 Supp.); Purdon's Pa. Stat. Ann., Tit. 11, Sec. 247 (1954); Code S.C. Laws, Sec. 15-1095.19 (1968 Supp.); Utah Code Ann., Sec. 55-10-94 (1967 Supp.); Vt. Stat. Ann., Tit. 33, Sec. 651(a) (1968 Supp.); Rev. Code Wash. Ann., Sec. 13.04.030.

By judicial decisions in: Calif.: *In Re Daedler*, 194 Cal. 320, 228 P. 467 (1924); Conn.: *Cinque v. Boyd*, 99 Conn. 70, 121 A. 678 (1923); Md.: *In Re Fletcher*, 251 Md. 520, 248 A.2d 364 (1968); Mass.: *Comm. v. Page*, 339 Mass. 313, 316, 159 N.E.2d 82, 85 (1959) (*dictum*); *Marsden v. Comm.*, 352 Mass. 564, 227 N.E.2d 1, 2 (1967) (*dictum*); N.C.: *In Re Watson*, 157 N.C. 340, 72 S.E. 1049 (1911); *State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920); N.H.: *In Re Perham*, 104 N.H. 276, 184 A.2d 449 (1962).

demand.[5] Of the remaining five states, it is very probable that four of them would not grant a jury trial if the question were directly raised for decision.[6]

Admittedly, the customs and usages of even a substantial number of states should not be of controlling weight when great constitutional rights are at stake. But here the issue of retroactivity does not reach the level of constitutional concern. It is more a matter of practicalities in this Court's ordering of newly enunciated or more broadly expanded constitutional rights. Yet, even if it were otherwise, as Mr. Justice Clark once said,

> "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of

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[5]By statute in: Colo. Rev. Stat. Ann. 22-8(1); Kan. Stat. Ann. 38-808 (1968 Supp.) but here the Juvenile Court merely refers the issues to another tribunal for a jury trial and then it is returned for disposition to the Juvenile Court; Mich. Stat. Ann., Sec. 27.3178 (598.17); Rev. Codes Mont., Sec. 10-603 (1947); Okla. Stat. Ann., Tit. 10, Sec. 1110; S.D. Code (1939), Sec. 43.0331 (but only the court may order a jury of six); Vernon's Ann. Rev. Tex. Stat., Art. 2338-1, Sec. 13(b); W.Va. Code Ann., Sec. 49-5-6; Wis. Stat. Ann., Sec. 48.25(2) (1957); Wyo. Stat. Ann., Sec. 14-108(c) (1961); D.C. Code Ann., Sec. 16-2307.

By judicial decision in: *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

[6]In Virginia, *amicus* is advised that the current practice opposes a jury trial. See, in general, Code Va. Ann., Sec. 16.1-162 (1950). In Maine, the statute stipulates an informal juvenile court hearing. Me. Rev. Stat. Ann., Sec. 15-2610. In Illinois, the earliest act provided for a jury but the latest revision makes no mention of the matter. In Tennessee the earlier right to a jury trial statute was repealed in 1955 and its replacement does not mention the issue. In Tennessee the earlier right to a jury trial statute was repealed in 1955 and its replacement does not mention the right. Tenn. Code Ann., Sec. 37-244. Finally, in Rhode Island, the most recent statutory amendment has replaced the direct prohibition of a jury with silence. Gen. Laws R.I., Sec. 14-1-30 (1967 Supp.).

justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[7]

It appears to the *amicus* that it would be of dubious merit for the Court to overturn such an established practice throughout the overwhelming number of states. However, to do so retroactively would be a severe blow to those thirty-four or more states which have relied on their right to try juveniles without a jury trial. And this "point of reliance is critical . . . because it determines the impact that newly articulated constitutional principles will have upon convictions obtained" under practices "not previously proscribed." *Jenkins v. Delaware,* ___ U.S. ___, 23 L. Ed. 2d 253. Of course, it goes without saying that the reliance of juvenile courts, prior to *Duncan,* on their right to try juveniles without a jury was in complete good faith and wholly justifiable.

Further, even the juvenile court decisions in those twelve jurisdictions which do permit a jury trial upon demand could be adversely affected by an application of *Duncan* to this cause. It is not at all fanciful to suppose that, in those states, juveniles who did not demand a jury trial might now contest their confinement on the premise that their right to a jury trial is an affirmative right of which they must be given notice by the juvenile court and a waiver of that right cannot be deduced from their unknowing failure to demand a jury trial.

There are other persuasive arguments against applying the right of a jury trial retroactively to juvenile proceedings held prior to *Duncan* and *Bloom, supra.* Recently, and quite frequently, this Court has reviewed the question of whether newly enunciated or expanded constitutional standards should be given retroactive effect. With but an occasional exception,[8] the decisions of this Court have denied

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[7] *Leland v. Oregon,* 343 U.S. 790, 798.

[8] *Jackson v. Denno,* 378 U.S. 369; *Griffin v. Illinois,* 351 U.S. 12; *Gideon v. Wainwright,* 372 U.S. 335.

the retroactive applicability of newly articulated constitutional commands. The refusal in the *DeStefano* case to apply the jury trial retroactively is only one of these. The exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, was not applied retroactively in *Linkletter v. Walker*, 381 U.S. 930. Nor was the Fifth Amendment's privilege against self-incrimination, *Tehan v. Shott*, 382 U.S. 406, or the right to counsel at a line-up, *Stovall v. Denno*, 388 U.S. 293. Similarly, this Court's landmark holdings in *Escobedo v. Illinois*, 370 U.S. 478, and *Miranda v. Arizona*, 384 U.S. 436, were held to have prospective effect only in *Johnson v. New Jersey*, 384 U.S. 719. Again, *Lee v. Florida*, 392 U.S. 378, was denied retroactive effect in *Fuller v. Alaska*, 393 U.S. 80. And in *Kaiser v. New York*, 394 U.S. 280, this Court refused retroactive effect for its decision in *Burger v. New York*, 388 U.S. 41. The same was true for the constitutional right upheld in *Katz v. United States*, 389 U.S. 347. See *Desist v. United States*, 394 U.S. 244. Finally, it may be of importance to note that at least one state court has thus far held that the jury trial rights bestowed by reason of this Court's decision in *Duncan* and *Bloom, supra*, are not, as a consequence of its later holding in *DeStefano v. Woods, supra*, to be applied retroactively to juvenile court proceedings prior to May 20, 1968. *In Re J.F.*, 74 Cal. Rptr. 464 (Ct. App., 1969).

Conceivably, the non-retroactivity rule may be avoided by asserting that the cause was pending in the form of review by *habeas corpus* petition at the time of the decision now claimed to be binding. *Linkletter v. Walker, supra*. However, the posture of this case is such that an argument of this kind is totally inapposite. Counsel for appellant chose to challenge the Nebraska Juvenile Court Act's non-jury provision through the collateral device of a *habeas corpus* petition. There was, however, an available appellate remedy first to the District Court (Neb. Const. Art. V, Sec. 17) and then to the Nebraska Supreme Court (Neb. Const. Art. I, Sec. 24; Sec. 25-1912, Rev. Stat. of Neb. (1964), both of which counsel for the appellant chose not to pursue.

Anomalies abound in the law, but they should not needlessly be encouraged. Indeed, "it is incumbent upon this Court to endeavor to keep such incongruities to a minimum." *Jenkins v. Delaware, supra,* at 262 (Harlan, J. dissenting). It is believed that a decision in this cause applying the right to trial by jury retroactively in juvenile cases would create more than a logical incongruity. The arguments now proliferating over the constitutional procedural aspects of a juvenile proceeding are primarily between those who maintain that a juvenile court should be bound by the same constitutional standards to which the juvenile would have been entitled if he had been tried as an adult in a criminal court and those who argue that there is a distinction, not without a difference, between the juvenile court's operations and objectives and those of a criminal court, which difference justifies the application of different constitutional standards in each court. However, no one has as yet asserted, or even suggested, that juveniles before the juvenile court are entitled to more constitutional protections than their criminal court counterparts. In fact, retroactive application of *Duncan* and *Bloom* in this case would establish such an anomalous result. Adult criminals tried prior to May 20, 1968, cannot claim a right to a jury trial, but juveniles adjudicated as delinquents prior to that date could. It is submitted that such an incongruity and even an injustice—to adult criminals—should not be permitted.

In further reply, the appellant might argue that the nonretroactivity of *Duncan* and *Bloom; supra,* should not control appellant's right to a jury trial since *DeStefano* only spoke to the issue of retroactivity in connection with criminal trials, whereas appellant seeks a jury trial in a juvenile cause. This would be an especially strange and unpersuasive argument for appellant to assert. Throughout he has attempted to analogize his juvenile trial to the trial of an adult for a criminal offense. At this late date, his position would not be improved by such an abrupt about-face in his reasoning. Moreover, it seems evident that this cause is factually and legally very close to the situation which con-

fronted the Court in *DeStefano*. In both cases it is proposed to apply a right to a jury trial retroactively and in so doing also to extend it beyond the limits of *Duncan* and *Bloom*. *DeStefano* involved an effort to expand the jury trial right so as to require a unanimous jury verdict for a conviction. A parallel type of expansion is suggested by appellant, *i.e.*, to extend the jury trial right in criminal causes to juvenile proceedings. The distinctions existing between *Duncan* and *DeStefano* and those existing between this cause and *Duncan* are of no relevance since the basic issue is the same—shall the jury trial right be applied retroactively? We believe it clear that such retroactivity is not justified.

Amicus recognizes that this Court has not yet said whether *In Re Gault*, 387 U.S. 1 (1967) should have retroactive effect and the state courts are irreconcilably divided on this issue.[9] But a decision one way or the other on that matter should have no impact upon the question of retroactivity in this cause. Just as the issue of retroactivity in *Tehan v. United States ex rel. Shott, supra* (privilege against self-incrimination), was in no degree foreclosed or affected by the decision on the retroactivity of the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335, so, too, the retroactivity of a jury trial in a juvenile matter should be considered independently of the wholly distinct and different constitutional rights at issue in *Gault*.

Moreover, the situation in *Gault* is distinguishable on another ground as well. *Gault* involved, in part, the right to counsel at juvenile hearings. Before *Gault* that right had been given constitutional stature in criminal prosecutions and had been granted retroactive effect there. Here, however, *DeStefano* unequivocally articulates a policy of nonretroactivity as to the right to a jury trial. Where retroactivity is decreed in the one case, as it was in *Gideon*, it is

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[9] *Gault* held to be retroactive in *Application of Billie*, 103 Ariz. 16, 436 P.2d 130 (1968). *Contra: Cradle v. Peyton*, 208 Va. 243, 156 S.E.2d 874 (1968) and *In Re Harris*, 67 Cal. 2d 876, 434 P.2d 615, 617 (1968).

tenable to hold that juvenile causes must follow suit. Yet where retroactivity is denied, as it was in *DeStefano*, the argument for retroactivity in juvenile cases is wholly without substantive support.

Finally, it might be said, at the cost of straining appellant's own logic, that the constitutional rationale for a jury trial in a criminal prosecution is different from that which might persuade the Court to require a jury trial in a juvenile hearing. The rationale of *Gault* seems quite distinguishable from that which has moved this Court to enforce various of the provisions of the Bill of Rights upon the states in criminal cases. We believe it fair to conclude that *Gault* is predicated upon an analysis of the due process clause of the Fourteenth Amendment which necessitates a determination whether a claimed constitutional right is a matter of fundamental fairness or not. This is hardly an objective test of due process. On the contrary, the recent spate of criminal law decisions on the part of this Court has most frequently defined the due process clause more as a conduit for the bodily incorporation of the Bill of Rights. Beyond much question such an analysis of due process is somewhat more objective than that espoused by the Court in deciding *Gault*.

Although it may be conceded that the *Gault* analysis of due process requirement differs from the incorporation rationale applied in cases such as *Duncan* and *Bloom*, that is not to say that such a variance in analysis of the basis on which different constitutional rights rest justifies retroactive applicability of any right to a jury trial in a juvenile cause. Certainly, *Duncan* was decided on an incorporation theory and *DeStefano* refused to apply the consequence of that theory retroactively. But one could hardly now be heard to say that *Duncan* should be applied retroactively because there may be other justifications for the criminal trial right to a jury, the bases of which are unaffected by *DeStefano*. The *DeStefano* decision cannot, we believe, be so subtly overturned or limited.

Indeed, should such reasoning prevail, any of this Court's decisions as to the retroactivity of a new constitutional right would be in jeopardy simply by a resort to a metaphysics of constitutional interpretation which would change the substance of a constitutional holding by accidental modifications in the rationale of that holding. The criteria for determining the question of retroactivity are those stated in *Stovall v. Denno, supra.* Surely those standards are unrelated to and separate from the criteria to which the Court looks before enunciating new, or enlarging old, constitutional rights.

In view of the arguments set out in this initial section of the *amicus'* brief, it is submitted, therefore, that the Court should not enforce retroactively the jury trial right enunciated in *Duncan* and *Bloom*, in disregard of *DeStefano*, to this juvenile court proceeding. Rather, the Council respectfully suggests that the order noting probable jurisdiction in this case be vacated and appellee's motion to dismiss for want of substantial federal question be granted.

II.

DUE PROCESS DOES NOT REQUIRE THE RIGHT OF A JURY TRIAL FOR A JUVENILE CHARGED AS A DELINQUENT IN A JUVENILE COURT PROCEEDING

The *amicus* accepts the appellant's statement of the jury trial issue which his appeal attempts to present. However, it believes that this issue is best to be determined by first answering the question: Shall the meaning and scope of due process for juveniles in juvenile court proceedings be determined through the selective absorption of rights specified in the Bill of Rights or by full scale incorporation of those rights as part of the guarantees afforded by the Fourteenth Amendment? For reasons it now states, the *amicus* believes: (1) that the due process requirements which must be observed in juvenile court proceedings are to

be determined through a process of selective absorption of the rights contained in the Bill of Rights according to a standard of "fundamental fairness"; (2) that the right to a jury trial in juvenile court proceedings is not one which must be provided by virtue of any requirement of due process; and (3) that the far reaching practical consequences if a jury trial in juvenile court proceedings is required of the states furnish an additional consideration militating against the imposition of such a requirement.

A. *Fundamental Fairness Is the Controlling Criterion.* The decision in *In Re Gault*, 387 U.S. 1, the necessary operations of the juvenile court and the requirements of constitutional principle compel a holding that the only constitutional rights that should be required to be observed in the juvenile court are those that are considered to be fundamental to fairness to the juvenile.

Since the decision in *Re Gault, supra*, there has been expressed a continuing concern lest the constitutional precepts now applicable to adults in criminal proceedings be applied automatically and totally in juvenile court proceedings.[10] It seems to the Council that this anxiety is not well founded. Mr. Justice Fortas, in *Gault*, used language which unambiguously affirms that it was not the intention of the Court to transform the juvenile court into but another criminal court. As he put it, reiterating his view in *Kent v. United States*, 383 U.S. 541, 562:

> "We do not mean . . . to indicate that the hearing to be had must conform with all of the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must

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[10] Rosenheim, *Standards for Juvenile and Family Courts: Old Wine in a New Bottle*, 1 Family L.Q. 25, 28 (1967); Wheeler and Cottrell, Juvenile Delinquency: Its Prevention and Control 33 (Russell Sage Foundation 1966).

measure up to the essentials of due process and fair treatment."[11]

The *Gault* standard of due process then, at least as far as the procedures of state juvenile courts are concerned,[12] is one which asks whether the constitutional right in question is a necessary precondition to the accomplishment of fundamental fairness in a juvenile court. And in the application of this standard, it is to be recalled that *Gault* also teaches that the due process standard is to be "intelligently and not ruthlessly administered." *In Re Gault, supra,* at 21.

Admittedly, it might facilitate at least the mechanics of constitutional decision-making if the "spacious language" (*Duncan v. Louisiana, supra,* at 148) of the due process clause of the Fourteenth Amendment were construed to embrace all of the rights contained in the Bill of Rights. But this Court has never followed such a course with respect to adults charged with crimes; nor should it now as to juveniles similarly charged. If ease in decision-making is to be the talisman for the application of constitutional rights, another method is at hand. It would be possible for this Court to infuse into the juvenile court all of those constitutional protections to which adults accused of crime are entitled under the due process clause of the Fourteenth Amendment. Some few courts[13] and scholars have declared their allegiance to this view.[14] Yet this Court, in *Gault,* carefully eschewed such an uncritical and mechanical application of constitutional rights in the juvenile court. Other

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[11] *In Re Gault,* 387 U.S., at 30.

[12] *Nieves v. United States,* 280 F. Supp. 994 (S.D.N.Y., 1968) which adopts the Sixth Amendment's right to trial by jury for proceedings under the Federal Juvenile Delinquency Act.

[13] *Ibid.*

[14] Boches, *Juvenile Justice in California: A Re-evaluation,* 19 Hastings L.J. 47 (1967); Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers,* 52 A.B.A.J. 923, 924 (1966).

persons, both critics[15] and supporters[16] of the juvenile court alike, have espoused a similar view. Indeed, the state courts, including even the Arizona Supreme Court in *Gault*,[17] have consistently asserted that the issue is what affords fairness to the juvenile, not what are the rights to which an adult can lay a constitutional claim in criminal proceedings.[18]

This distinct and independent fairness to the juvenile criterion of constitutional rights has been developed and maintained for sound reasons. It is not necessary for us to accept the lazy logic of labels to recognize, as this Court did in *Gault, supra,* at 22, that criminal proceedings and juvenile court procedures are distinguishable in ways that should be maintained. Underlying these variants from the criminal court model, as prescribed for juveniles, is the understanding that there is a rational basis for procedural differences between juveniles charged with crime and their adult counterparts. It goes without saying that juveniles are at an age when the enticements of crime are most alluring, when their sense of right and wrong is at its peak, and when their susceptibility to reform is the greatest.

These sociological and psychological findings, among others, gave birth to, and still justify, the less formalistic procedural functioning of the juvenile court. This court, as it has evolved, has been characterized by Dean Francis Allen as "the most important and ambitious effort yet undertaken by our law to give practical expression to the rehabil-

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[15]Dorsen and Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 Family L.Q. 1, 3 (1967); Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. Law Review 547, 550 (1957); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 186.

[16]Rosenheim, *Standards for Juvenile and Family Courts, supra*; Wheeler and Cottrell, Juvenile Delinquency, *supra*.

[17]*Application of Gault*, 99 Ariz. 181, 407 P.2d 760 (1965).

[18]*In Re State in Interest of Carlo*, 48 N.J. 224, 225 A.2d 110, 116 (1966); and see cases cited at *In Re Gault, supra*, at 12, fn. 8.

itative ideal."[19] It is, therefore, unnecessary and, indeed, self-defeating for us either to invoke or to parry labels in order to justify the independent existence of the juvenile court. Whether it be called civil, quasi-criminal,[20] *sui generis* or otherwise, it is clear that:

> ". . . even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches far beyond the scope of its authority over adults . . ."[21]

It is submitted, therefore, that the applicability of a particular constitutional right in the juvenile court, when invoked under the mandate of due process, should be tested by its relevance to the standard of fairness to the juvenile within the total context of the juvenile court's quest for the rehabilitative ideal. Judged in that light, *amicus* contends that the right to trial by jury is not so fundamental to a system of ordered liberty that it must be observed in a juvenile court proceeding where the court's disposition is much less severe than the maximum possible penalty that could be imposed by a criminal court for the same offense.

B. *A Jury Trial Is Not Required.* Due process is not violated by a rejection of the jury trial in a juvenile court because the predominant practice among the states indicates that the jury trial is not so fundamental in the juvenile court as to be raised to a constitutional dimension. Nor is the jury on its own merits any more tangibly accurate than a judge in finding the facts. Finally, it is not justifiable to stigmatize the juvenile court as imposing severe penalties when the range of possible penalties in the criminal court for the same offense is far more onerous.

The critical issue, in determining whether due process requires the application of the Sixth Amendment's right to

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[19] Allen, The Borderland of Criminal Justice 48 (1964).

[20] Welch, *Delinquency Proceedings Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 Minn. L. Rev. 653 (1966).

[21] *Ginsberg v. New York*, 390 U.S. 629, 638.

a jury trial in juvenile court proceedings, is whether the right to a jury trial is so fundamental that a proceeding conducted in its absence must be said to be intrinsically unfair. This fundamental fairness doctrine has more than conceptual integrity. It has been deliberately refined and carefully honed by a long series of opinions from this Court so that it is not the elusive and ill-defined notion that, at first glance, it might appear to be. The latest and most important exposition of it which is directly pertinent to this case occurred in *Duncan, supra.* There, Mr. Justice White spoke not of fundamental fairness in the abstract but of such fairness according to the meaning "the American scheme of justice" concretely ascribes to it. Mr. Justice White went so far as to hypothesize "A criminal process which was fair and equitable but used no juries . . " *Duncan v. Louisiana, supra,* at 150, fn. 14. Yet, since "no American State has undertaken to construct such a system" (*Duncan v. Louisiana, supra,* at 150, fn. 14) such an imagined but untried system could not square with the requirements of fundamental fairness under the due process clause. At a later point in the same opinion, Mr. Justice White again emphasized that the "strong support" which the jury trial right in criminal causes had received in the laws of every state was very pertinent in determining whether it was fundamental in the American system of justice. *Duncan v. Louisiana, supra,* at 154.

It is clear, therefore, from *Duncan* and even before,[22] that due process must take into account the practices found suitable by the deliberative process of legislative and judicial action throughout the states. On that analysis, the juvenile court, as presently conducted in thirty-four states,[23] cannot be found wanting in due process by proceeding in the absence of a jury trial. It is to be recalled that the right to a jury ~~trial~~ in juvenile courts has been denied juvenile courts both by legislative action and by the appellate

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[22] *Leland v. Oregon,* 343 U.S. 790, 797.

[23] See fn. 4, 5 and 6, *supra.*

opinions in cases contesting the legislative mandate.[24] Moreover, the opinions of the scholars, with only a rarely encountered dissent,[25] oppose the incorporation of the jury trial into juvenile court proceedings.[26] The Standard Juvenile Court Act[27] and the Uniform Act[28] do not provide for it. And the recent Minnesota Juvenile Court Rules have not adopted it.[29] Nor was it viewed with approbation by the Task Force Report on Juvenile Delinquency and Youth Crime of the President's Commission on Law Enforcement and the Administration of Justice.[30]

Even those twelve jurisdictions which do permit a jury trial in juvenile matters do not make any strong case for the fundamental fairness of having a jury in the juvenile court. For example, statistics for the District of Columbia indicate that: "Only three jury trials were held between March 1, 1964 and February 28, 1966,"[31] and that in 1967,

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[24] *Dryden v. Comm.*, 4 Cr.L.Rep. 2253 (Ky. Ct. App., 1968); *Estes v. Hopp*, 73 Wash. 2d 272, 438 P.2d 205 (1968); *Comm. v. Johnson*, 211 Pa. Super 62, 237 A.2d 9 (1967). *Contra: Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

[25] Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 400-401 (1961). But Professor Antieau bases his judgment, in part, on an erroneous finding that "the legislatures in almost half the states" provide for a jury trial in juvenile court matters; Dorsen and Rezneck, *supra*, at 22-23; *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal* (Note), 114 U. Pa. L. Rev. 1171, 1187 (1966).

[26] Tappan, Juvenile Delinquency 211-212 (1949); Sheridan, Standards for Juvenile and Family Courts 73 (Children's Bureau, 1966).

[27] Section 19 (6th Ed. 1959).

[28] Uniform Juvenile Court Act, Section 24(a) (Natl. Conf. Comm. on Uniform State Laws, 1968).

[29] Minn. Juvenile Court Rules, Minn. Stat. Ann. Supp. 1969, foll. Chap. 260 (1969).

[30] P. 38.

[31] Report of the President's Commission on Crime in the District of Columbia 1010, fn. 41.

there were eleven jury trials and in 1968 but thirty-two.[32] In Denver, it has been said that there were two requests for a jury trial in twenty-five years.[33] The jury trial is most frequently waived[34] or requested for tactical reasons in order to induce a lesser charge or more lenient disposition from a court or prosecutor with an overcrowded docket. None of this data suffices as compelling evidence of the fundamental character of the jury trial in juvenile causes.

The debate over the merits of the jury trial in civil and criminal causes is well-known and amply documented.[35] The positions of the protagonists have at times been stated in flamboyant terms. According to former Dean Griswold, now Solicitor General of the United States: "The jury trial at best is the apotheosis of the amateur."[36] On the other hand, Lord Justice Devlin has said that "it is the lamp that shows that freedom lives."[37] The *amicus* suggests that in such exchanges there may be more rhetoric than reality in the conflicting appraisals of the value of a jury trial.

Rhetoric aside, it is still possible to define the concrete bases asserted to justify the existence of the jury trial as an essential component of the American system of justice. It is said to be effective as a fact-finding mechanism.[38] However, the recent University of Chicago jury trial study shows that judges and juries agree on the proper disposition of criminal cases in 75.4% of the cases studied.[39] This pattern

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[32] Annual Report of the Juvenile Court of the District of Columbis, Fiscal Year 1968, p. 9.

[33] *Juvenile Delinquents: The Police, State Courts, and Individualized Justice* (Note), 79 Harv. L. Rev. 775, 793-794 (1966).

[34] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 186.

[35] *Duncan v. Louisiana*, *supra*, at 156-157.

[36] 1962-1963 Harvard Law School Dean's Report, pp. 5-6.

[37] Devlin, Trial by Juty 164 (1956).

[38] Dorsen and Rezneck, *supra*, at 23.

[39] Kalven and Zeisel, The American Jury 56 (1966).

of agreement is strong evidence that juries are not significantly better equipped to find the facts than judges are. The same point has been made by some state courts in rejecting the constitutional necessity for a jury trial in juvenile courts.[40]

It has also been argued that the right to a jury trial "was clearly intended to protect the accused from oppression by the Government . . . ."[41] Yet past intentions should be read in the light of current realities. Or as Mr. Chief Justice Burger has said:

> ". . . a government bent on destroying individual liberties can do it with a jury or with a non-jury inquiry system. You can juggle any system if you've got enough power in the establishment to do it."[42]

Juries have, it has been said, a virtue in that they may "afford a higher justice by refusing to enforce harsh laws . . . ."[43] Still, the jury that is flexible or non-rule minded enough, or not sufficiently cognizant of its oath, to acquit in one case may in a later case convict on whimsy, too. "One is tempted to say that what is one man's equity is another man's anarchy."[44]

Then again, juries are said to be a buffer against the "overworked judge"[45] who will give a case the assembly line treatment, or "as a protection against jaded judges who hear case after case, day in and day out and decide on past

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[40] *Dryden v. Comm.*, *supra*, note 24.

[41] *Singer v. United States*, 380 U.S. 24, 31; *Duncan v. Louisiana*, *supra*, at 155.

[42] 1 The Center Magazine 7, November 1968.

[43] *Duncan v. Louisiana*, *supra*, at 187 (Harlan, J. and Stewart, J. dissenting).

[44] Kalven and Zeisel, *supra*, at 9.

[45] Dorsen and Rezneck, *supra*, at 23.

prejudices rather than present evidence."[46] Such generalities are more epigrammatic than informative. Whereas some juvenile judges are bound to be insensitive, others are equally certain to be compassionate and experienced. The experience of trying cases is not always a debilitating influence upon good and conscientious judges. It may also awaken in them responses and sympathies which no amount of theorizing would loose. In any event, any seasoned trial attorney knows that juries quickly become jaded, too. Witness, for example, the jockeying with the criminal trial calendar on the part of defense counsel in order to avoid the adverse impact of a trial before a jury soured by one month's experience in court. Or as Kalven and Zeisel have put it,

> "Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude."[47]

In recognition of this sometimes heated and almost never empirically valid debate, where hyperbole abounds, over the merits of the jury system, it would be anomalous to import the jury trial wholesale into the juvenile court on the theory that it is so fundamental to our way of justice as to be imperative in the juvenile court as elsewhere. Whatever the stature of the jury trial in criminal causes, this *amicus* maintains that its desirability is sufficiently debatable to lay open to question its status as a fundamental necessity required by due process in juvenile court proceedings.

Duncan makes it clear that the issue of the fundamental nature of a claimed constitutional right cannot be ascertained in the absence of an appraisal of the juridical consequences of the factual occasion into which it is asked to be

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[46] *Criminal Offenders in the Juvenile Court, More Brickbats and Another Proposal, supra,* at 1187.

[47] Kalven and Zeisel, *supra,* at 498.

introduced. In other words, the seriousness of the offense is a relevant gauge of the expansiveness of the due process requirements which must control. The facts in this case indicate that the appellant was charged, by the petition, with the crime of forgery in violation of Sec. 43-201(4) Rev. Stat. of Neb. (1964) (A. 1), and that for that offense, if tried and convicted as an adult, he could have received a sentence of confinement from one to twenty years. As it happens, however, appellant was tried in the juvenile court where the maximum term of his confinement under juvenile court jurisdiction would have to terminate upon his reaching twenty-one years of age. Unlike the factual situation in *Gault* and other cases challenging the constitutionality of juvenile court proceedings,[48] appellant received the better of both possible worlds in the consequences attaching to his juvenile court trial.

Duncan indicates that the seriousness of an offense constitutes the dividing line between the existence and the non-existence of the constitutional right to a jury trial in a criminal case. The later opinion of this Court in *Frank v. United States*, ___ U.S. ___, 23 L. Ed. 2d 162, reaffirms this position. Nevertheless, what may be properly determinative for the criminal court is not necessarily so for the juvenile court. Juvenile cases are rarely petty, if by petty is meant capable of subjecting the juvenile to a period of confinement of less than six months.[49] The severity of the offense guideline of the criminal law is inappropriate in the juvenile court. A child found to have committed even a minor offense may also be found to require commitment to a training school or some similar restriction of his liberty. Moreover, confinement is not the only measure that the community uses to illumine its view of the seriousness of an offense. Penalties have qualitative as well as quantitative

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[48] *In Re Urbasek*, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

[49] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, *supra*, at 188.

differences,[50] as is readily observed in the juvenile court and in this case in particular.

Therefore, *amicus* maintains that the logic which has given the jury trial right a commanding place in criminal cases is inapplicable in the context of the juvenile court, in view of the nature of the court, its dispositional alternatives and the debatable merits of the jury trial right itself. On balance, we believe that the jury trial right is not so fundamental as to be required in a juvenile court bound by the commands of due process.

C. *The Impact on Juvenile Court Justice Should Jury Trials Be Required.* A jury trial right in the juvenile court will necessarily give rise to other incidental issues, including matters of the scope of the *voir dire* and the proper venue of trial, and will inevitably engage the juvenile court in a formal, adversary procedure. This will involve a time-consuming, combative process sorely damaging to the rehabilitative ideal which moves that court. The incorporation of the jury trial right into juvenile courts is also likely to cast doubt upon the legitimacy of other commitment procedures of quasi-criminal character which result in subjecting persons to extended periods of institutionalized loss of liberty.

Decisions on an issue of the magnitude of that presented by this cause cannot be determined in a vacuum. The right to a jury trial is a wayside en route to other constitutional vistas. It is impossible to decide the question of the right to a jury trial without opening a host of collateral issues which are intrinsic to the operation of a jury trial system. If there is to be a right to a jury trial, how, if at all, may it be waived? How are jurors to be selected, challenged, and instructed? Upon what quantum of proof are the jurors to reach their decision? The myriad issues which must be resolved are very adequately canvassed in the Standards

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[50] Paulsen, *Juvenile Courts and the Legacy of '67*, 43 Ind. L.J. 527, 536 (1968); Welch, *Kent v. United States and In Re Gault: Two Decisions In Search of a Theory*, 19 Hastings L.J. 29, 35 (1967).

Relating to Trial by Jury proposed by the American Bar Association's Project on Minimum Standards for Criminal Justice (T.D. 1968 with amendments).

Amicus is concerned lest, in deciding the jury trial issue, this Court may unintentionally produce an effect with much more extensive ramifications than are envisioned by the right to trial by jury considered only in the abstract and without regard to its actual functioning in the context of a juvenile court. The right to a jury trial does not travel without its necessary impediimenta.[51] These may have a constitutional dimension, if the right to jury trial does so. It is not frivolous to suppose that those jurisdictions which permit a jury trial by six jurors in a juvenile court[52] will be challenged for not adhering to the more traditional and, therefore, constitutionally required jury of twelve. *DeStefano v. Woods, supra;* which raised the issue of the constitutional right to a unanimous verdict of a jury, is clear testimony that a declaration of the constitutional right to a jury trial is but an opening wedge for a flood of endless and troublesome questions, which will put the juvenile court to the test as much as they will this Court.

And then again the coming of a jury trial to the juvenile court is bound to bring the "clash and clamor"[53] of adversary proceedings which give the aura of gamesmanship which characterizes so many criminal jury trials. It may be that the informality of the juvenile court is not an unmixed blessing,[54] but it does have certain positive advantages for the juvenile. It frustrates the urge of the youth for noto-

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[51] *Bloom v. Illinois,* 391 U.S. 195, 213 (Fortas, J. concurring).

[52] Mich. Stat. Ann. 27.3178 (598.17); Okla. Stat. Ann. Tit. 10, Sec. 1110; S.D. Code (1939) 43.0331.

[53] *Dryden v. Comm., supra,* note 24.

[54] Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 Wis. L. Rev. 7, 19; *Rights and Rehabilitation in the Juvenile Courts* (Note), 67 Colum. L. Rev. 281, 284 (1967).

riety and attention.[55] It removes some portion of the stigma of criminality[56] and it softens the impact of charge, trial and disposition upon an impressionable youth.

There may be some doubt, resulting from an empirical void, as to the exact nature of the rapport between judge and juvenile, as well as the extent to which a jury trial will have a traumatic effect of any substantial duration upon the juvenile. Yet, it is reasonably clear that "tearing the 'socialized' procedure out of our [juvenile court] system is not a great leap forward . . ."[57] for the juvenile. "For children who are receiving the 'worst' of both worlds, it is no great achievement to brighten the one that may not matter as much to them."[58] And the constitutional domestication of juvenile court procedure is an empty formality unless there is provision for notice, understanding and motivation in the assertion of this new program of rights. But the accomplishment of these ends and the consequent implementation of the new rights present great problems which *amicus* suggests should not be taken lightly in determining the constitutional right of a juvenile to a jury trial.

The juvenile court, it is to be observed, is not the only quasi-criminal tribunal with the power to institutionalize persons without engaging in a trial by jury. Sex psychopath laws often have the same effect. Mental commitment procedures are well-known and frequently used illustrations of such authority to cause loss of liberty. Even in criminal proceedings, there might well be pre-trial hearings on an issue of the accused's competency to stand trial with a resulting long-term deprivation of liberty. And in the juvenile court, in dependency cases, a similar consequence often

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[55] Tappan, Juvenile Delinquency, *supra*, at 146.

[56] Rubin, Crime and Juvenile Delinquency 66 (1958).

[57] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 192.

[58] Handler, *The Juvenile Court and The Adversary System*, *supra*, at 32.

follows from a jury-less proceeding. *Amicus* is concerned that a decision in this cause requiring a jury trial in the juvenile court will have a domino-like effect upon those other proceedings which entail confinement and loss of liberty. It is suggested that these consequences should not be discounted in arriving at a conclusion on the merits of the jury trial issue posed in this case.

On balance, therefore, it is submitted that the jury trial in juvenile court is not so fundamental as to warrant a holding that will have such far-reaching effects within the structure of the juvenile court and on other existing procedures in causes of an essentially parallel nature in other courts on other innumerable occasions.

III.

THE QUESTION OF THE PROSECUTOR'S DISCRETION NOT TO INSTITUTE CRIMINAL PROCEEDINGS SHOULD NOT BE DECIDED ON THIS RECORD

A. *The Question Was Not Considered Below.* In his brief on the merits appellant alleges that among the questions presented is his claim that he was denied due process under the Fourteenth Amendment because pertinent decisions of the Nebraska Supreme Court have held that prosecutors in that state have discretion as to whether they will proceed against a juvenile in the juvenile court or initiate criminal proceedings in an adult court. In this case, the prosecutor elected not to charge a seventeen-year-old boy as a criminal but instead to proceed against him in the juvenile court.

It is established that before this Court will review a decision of a state court, it must affirmatively appear in the record that the federal question pressed upon it was preserved in the highest court of the state having jurisdiction and that its decision on such issue was necessary to its determination of the cause. *Williams v. Kaiser*, 323 U.S. 471, 477; *S.W. Bell Tel. Co. v. Oklahoma*, 303 U.S. 206, 212-213; *Honeyman v. Hanan*, 300 U.S. 14, 18. It is not

enough that the claim for which review by this Court is sought was made in a state trial court, if such a contention was not preserved before the highest court of the state. *Hiawasse River Power Co. v. Carolina-Tennessee Power Co.*, 255 U.S. 341, 343-344. Examination of the record in this case, we believe, requires the conclusion that the question of the prosecutor's discretion to waive criminal proceedings in favor of proceeding against a juvenile in a juvenile court was not considered or determined by the Nebraska Supreme Court and should not be decided by this Court on the basis of the record now before it.

In the juvenile court, appellant's counsel was careful to object to the jurisdiction of that court on the grounds the proceedings there denied him a right to a jury trial allegedly guaranteed by the Sixth Amendment to the Constitution of the United States, as incorporated in the Fourteenth Amendment thereto (A. 4). No complaint or objection was voiced at that stage against the prosecutor's decision to proceed in the juvenile court, rather than commencing criminal proceedings against the appellant, as he had the option to do under the law of Nebraska. *State v. McCoy*, 145 Neb. 750, 18 N.W.2d 101 (1945); *Fugate v. Ronin*, 167 Neb. 70, 75, 91 N.W.2d 240 (1958).[59]

The last of the claims asserted in the *habeas corpus* petition which was filed in appellant's behalf in the trial court was that he was being deprived of his liberty under the Fourteenth Amendment of the Constitution because "his right to a jury trial and the protective procedures of the criminal code" were left to the unreviewable discretion of

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[59]Counsel for the appellant also objected to the introduction in evidence in the juvenile court proceedings of an incriminating written statement which the juvenile gave to a police officer under circumstances, appellant's counsel represented to the juvenile court, in which there was no showing that the juvenile had made an intelligent waiver of counsel and where the appellant had not had an opportunity to consult with his parents (A. 12). However, the appellant did not raise the issue of this pre-trial statement in the Nebraska courts (A. 18-19). Nor does he argue it in this Court.

the prosecutor to determine whether the applicant should be proceeded against in the juvenile court or tried as a criminal in an adult court (A. 19). The *habeas corpus* petition also raised the objections based on the applicant's alleged right (a) to a jury trial, and (b) to be convicted only upon the basis of evidence sufficient to convince the trier of the facts beyond a reasonable doubt (A. 18-19). The response to the petition for *habeas corpus* took issue only with appellant's claim that Section 43-206.03 of the Revised Statutes of Nebraska (1965) violated the Sixth and Fourteenth Amendments. The discretion contention was not answered (A. 20). The district court dismissed the petition for *habeas corpus* without written opinion (A. 21).

The law of Nebraska dispenses with any requirement that an appeal to the Nebraska Supreme Court be accompanied by an assignment of errors. In Nebraska, however, an appellant is required to set out in his brief with "particularity each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; . . ." Section 25-1919, Rev. Stats. of Neb. (1964). The Nebraska Supreme Court also requires that the brief for the appellant contain a specific statement of the errors complained of. *Mauder v. State*, 97 Neb. 380, 149 N.W. 800 (1914). Errors relied on but not definitely set out or discussed in an appellant's brief are not ordinarily considered. *Packard v. DeVoe*, 97 Neb. 740, 144 N.W. 813 (1913); *First National Bank v. Hedgecock*, 87 Neb. 220, 127 N.W. 171 (1910).

In the eighteen page brief which he filed in the Supreme Court of Nebraska, the appellant assigned as error on the part of the trial court its failure in "not finding that Sec. 43-206.03. Rev. Stat. of Neb. (1965) valid under the Sixth and Fourteenth Amendments . . . ."[60] However, the prosecutor's discretion to proceed against a juvenile either in a criminal court or in the juvenile court is not conferred by

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[60]Brief for the Appellant, Supreme Court of Nebraska, p. 2.

virtue of the statutory provision thus cited. Subsequently, in his Nebraska Supreme Court brief the appellant devoted a single paragraph to his contention that due process was offended by an unreviewable option exercised by the prosecutor in proceeding against him as a juvenile rather than charging him under the criminal code of Nebraska.[61] In his brief below, the appellant did not identify any particular Nebraska statutory provision, other than Sec. 43-206.03, Rev. Stat. Supp. (1965), which is alleged to violate the due process clause of the Fourteenth Amendment. However, he did cite one Nebraska decision, *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958), which, among others, has upheld the concurrent jurisdiction possessed by the juvenile courts and the regular criminal courts of Nebraska following alleged violations of the criminal law committed by juveniles in that state. The question, apparently, also was referred to during the course of oral argument, at least tangentially, by one of the judges of the Nebraska Supreme Court.[62]

The Nebraska Supreme Court did not pass upon appellant's challenge to the prosecutor's election to proceed against him in a juvenile, rather than in an adult criminal, court. The *per curiam* opinion of the court mentions only appellant's contentions that he was entitled to a jury trial and that he was entitled to application of the "beyond a reasonable doubt" rule in connection with his adjudication as a delinquent (A. 23). Similarly, the four judges who agreed with the appellant's claim of a right to a jury trial and to adjudication under the "reasonable doubt" standard did not take up any issue turning upon the prosecutor's discretion not to initiate a criminal prosecution against a juvenile (A. 23). In their opinion, the four who agreed with the appellant mentioned only in passing the permission which exists under Nebraska law by which a county attorney may determine "whether to file an action under the

[61] *Id.*, at 15.

[62] Brief for Appellant, filed in this Court, p. 30.

general criminal laws of the state, or a delinquency proceeding in the juvenile court" (A. 26). The three judges who voted to affirm the trial court's denial of a writ of *habeas corpus* also confined discussion and decision exclusively to the jury trial and standard of proof questions. They neglected even bare reference to any contention that the prosecutor's discretion to institute a juvenile proceeding rather than undertake a criminal trial violated the Fourteenth Amendment of the Federal Constitution (A. 32).

The above summary of the record below suggests that any federal constitutional question of the prosecutor's discretion not to institute criminal proceedings in this case was not fully argued before, and certainly not considered or decided by, the Nebraska Supreme Court. As in *Beck v. Washington*, 369 U.S. 541, 553, the limited one paragraph reference to the point in appellant's brief in the court below should not suffice to require its determination in this Court, at least on the basis of the present barren record. *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477; *Herndon v. Georgia*, 295 U.S. 441. In so arguing, the *amicus* does not cling to a mere technical point of jurisdiction or procedure. As shown in the next section of this brief, any challenge to a prosecutor's discretion to waive criminal charges in favor of juvenile court proceedings transcends issues evolving out of the administration of juvenile court justice and touches much broader areas of the permissible discretion of a prosecutor to institute, to reduce, or not to prosecute, criminal proceedings generally. This Court has admonished on numerous occasions that it will not decide constitutional questions prematurely and on an inadequate record. See, *e.g., Ellis v. Dixon*, 349 U.S. 458, 462. We appeal to the judicial restraint which underlies that admonition by urging in this case that the Court refuse to take up the appellant's complaint that he has been denied due process because the prosecutor chose not to treat him as an accused criminal.

The Court has persisted in its disinclination to review questions not properly preserved or considered in the courts

below in the face of substantial claims of First Amendment rights, *Wolfe v. North Carolina*, 364 U.S. 177, 294-195, and again where rather persuasive allegations of racial discrimination have been made, *Ellis v. Dixon, supra.* A recent manifestation of the Court's reluctance to decide important constitutional questions on the basis of an incomplete or inadequate record is found in *Powell v. Texas*, 392 U.S. 514, 521. In that case, four members of this Court declined the opportunity to determine that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the punishment of a chronic alcoholic for the crime of public drunkenness. As in *Powell*, so too the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which can alone support the announcement of a possibly wide-ranging new constitutional principle. 392 U.S., at 521. The record here, for example, is completely devoid of facts or statistics regarding: the states which permit a prosecutor to waive criminal proceedings and proceed against a juvenile in a juvenile court; the number of times that such an election has been made in Nebraska, or in other states; the statutory or other extra-judicial restraints which may place checks on abuse of the prosecutor's discretion; or any demonstration, statistically or otherwise, of any alleged adverse effect on juveniles whom prosecutors elect to proceed against as alleged delinquents rather than as accused criminals. Moreover, as we suggest in the concluding section of this brief, the narrow issue of a prosecutor's discretion not to institute criminal proceedings against a juvenile brings immediately into relevant focus analogous areas of discretion to institute or not institute criminal proceedings vested in prosecutors throughout this country from the days of the common law and never before seriously challenged on a constitutional plane.[63]

Accordingly, the *amicus* urges that the Court follow in this case the course it adopted in *Mishkin v. New York*,

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[63] *Prosecutor's Discretion* (Note) 103 Penn. L.R. 1057 (1955).

383 U.S. 502, 512-514, namely, that it not consider the merits of appellant's claim that the prosecutor's discretion to prefer juvenile to criminal proceedings is constitutionally defective. Since that question, we believe, like the issue declined in the *Mishkin* case, falls within the certiorari and not the appellate jurisdiction of the Court, we respectfully suggest that notation of probable jurisdiction in this case could be treated as a grant of a writ of certiorari on the issue of prosecutor's discretion and the Court could then dismiss the writ as improvidently granted, for the reasons argued in this portion of the *amicus'* brief.

B. *The Prosecutor's Discretion Might Have Been Reviewed in the District Court.* The appellant complains that the prosecutor's decision to proceed against the appellant in the juvenile court rather than in an adult criminal court is constitutionally defective. The alleged constitutional infirmity, argues the appellant, lies in the fact that the prosecutor's discretion is not subject to judicial review. More precisely, he claims that the Due Process Clause of the Fourteenth Amendment prevents determination of the court in which proceedings are to be brought against a juvenile from being left to the "discretion of a state officer outside the judicial system."[64]

In the immediately previous section of this brief *amicus* has suggested that any issue of the prosecutor's election in this case should not be taken up by the Court on the basis of the record made below. In the next and concluding portion of its brief the Council argues that, if the issue is now ripe for determination, then the discretion exercised by the prosecutor in this case should be upheld as a discretion similar in its aspects, nature and impact to other types of discretionary authority traditionally bestowed on prosecutors throughout the state and federal systems and never seriously challenged as transgressions of due process, equal protection or of other basic guarantees afforded by either

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[64] Brief for Appellant, p. 28.

the Federal Constitution or by the constitutions of any of the states.

At this particular juncture, however, the *amicus* makes a further point, although it bears some relation to both of the contentions summarized in the previous paragraph. There is in effect in Nebraska a statute which, on its face, might have provided a right of judicial review of the prosecutor's decision in this case. Section 25-1901, Rev. Stat. of Neb. (1964), provides:

> "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or *officer exercising judicial functions*, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."[65] (Italics supplied.)

A major assumption on the part of the appellant is his contention that when the prosecutor decides in which court he intends to proceed against a juvenile, he is, in effect, exercising a judicial function.[66] *Amicus* disputes this assumption. Still, if it be true, then the Nebraska statute cited above would appear to be applicable. Under appellant's own analysis, the prosecutor in this case was an "officer exercising judicial functions" whose decision to proceed in the juvenile court, in the words of the statute, could have been "reviewed, vacated or modified by the district court," the Nebraska court of original civil and criminal jurisdiction. There is no suggestion in the record that the appellant ever attempted to invoke Sec. 25-1901, *supra*.

We have here, then, a second instance where appellant elected not to pursue avenues of direct appeal through which his interests might have been adequately protected

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[65] This statute has been construed to cover the actions of executive or administrative officials. See, *e.g.*, *Pollack v. School District*, 54 Neb. 171, 74 N.W. 393 (1898), in which a county superintendent's order changing school boundaries was held to be reviewable by petition under the statute.

[66] Brief for Appellant, p. 3.

under the law of Nebraska without resort to allegedly applicable guarantees of the Fourteenth Amendment. If the prosecutor was exercising, as appellant claims, judicial functions, his exercise of discretion here could have been reviewed by the District Court by virtue of the state statute referred to above. On the other hand, if he was not performing a judicial function but merely, as the *amicus* argues, exercising a traditional and unquestionably valid prosecutor's discretion, his decision is one not subject to judicial review. In either event, the issue of the prosecutor's discretion should be resolved against the appellant.

IV.

DUE PROCESS WAS NOT OFFENDED BY THE PROSECUTOR'S DECISION TO PROCEED AGAINST APPELLANT AS A JUVENILE RATHER THAN AS A CRIMINAL

Should the Court reach the merits of appellant's claim that the prosecutor's decision to proceed against him in the juvenile court offended due process, it will be passing upon a singularly unique contention. In the reported precedents dealing with the issue of waiver or transfer of jurisdiction between juvenile and criminal courts of which the *amicus* is aware, the challenges involved were always those attacking the alleged unconstitutionality of, or illegalities in, a procedure through which a child was made subject to adult criminal justice rather than being proceeded against in a juvenile court.[67] Such challenges are understandable. As this Court observed in the leading case on the subject, *Kent v. United States*, 383 U.S. 541, the jurisdiction vested in a juvenile

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[67] Representative federal cases are: *Kent v. United States*, 383 U.S. 541; *Harling v. United States*, 101 App. D.C. 174, 295 F.2d 161 (1961); *Black v. United States*, 122 App. D.C. 393, 355 F.2d 104 (1965); *Watkins v. United States*, 119 App. D.C. 409, 343 F.2d 278 (1964). Among the recent state court decisions are: *Solis v. Texas*, 418 S.W.2d 265 (Civ. App., 1967); *Summers v. State*, ___ Ind. ___, 230 N.E.2d 320 (1967); *Brooks v. Boles*, ___ W.Va. ___, 153 S.E.2d 526 (1967); *Templeton v. State*, 202 Kan. 89, 447 P.2d 158 (1968); *State v. Piche*, ___ Wash. ___, 442 P.2d 632 (1968).

court "confers special rights and immunities on the child." Waiver of, or transfer from, that jurisdiction in favor of trial in an adult criminal court is a "critically important" action "determining vitally important statutory rights of the juvenile."[68] This conclusion seems irrebuttable in the face of the controlling realities. As a recent commentator has said:

> ". . . In effect, waiver is a judicial determination that the child is beyond the rehabilitative philosophy of the juvenile court 'and is "critically important" for the child who may be abandoned as "incorrigible" and for the society which has thus abandoned the child.' There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court. Not only is the juvenile exposed to the probability of severe punishment, but the confidentiality and individuality of the juvenile proceeding is replaced by the publicity and the normative concepts of penal law; the child acquires a public arrest record which, even if he is acquitted, will inhibit his rehabilitation because of the opprobrium attached thereto by prospective employers; if convicted as an adult, the child may be detained well past his twenty-first birthday; he may lose certain civil rights and be disqualified for public employment. Moreover, if sent to a typical adult prison, he is likely to be subjected to physical, and even sexual, abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly."[69] (Footnotes omitted.)

The Council agrees that a decision by which a child is made to stand trial in an adult criminal court is "in essence, a sentence of 'death' as a juvenile, with the subsequent pro-

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[68] 383 U.S., at 556.

[69] Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 Ind. L.J. 583, 586 (1968).

ceedings in the criminal court completing the execution."[70] In this case, however, appellant laments that he was spared such "sentence of 'death' as a juvenile." He complains because the prosecutor elected not to charge and try him as a criminal, as he had an option to do under the law of Nebraska.[71] Here, he contends that the prosecutor's decision to proceed against him as a juvenile was not subject to judicial review, an omission which appellant equates with a denial of the fundamental fairness guaranteed by the due process clause. On the other hand, appellant concedes that, if he had had a right to a jury trial in the juvenile court, an unreviewable decision on the part of the prosecutor to charge him in the criminal court would have been challenged. In that situation, appellant would assert that "a juvenile should not be deprived of the supposed dispositional advantages, including the disabilities flowing from a criminal conviction because of the prosecutor's whim."[72]

To the *amicus*, such a sophistical, "heads I win, tails you lose" approach to the issue of the prosecutor's election of jurisdiction represents a debasement of the purposes and spirit of the due process clause and the fundamental procedural rights over which it stands guard. Frankly, *amicus* believes that the appellant's paradoxical position on the point is the reflection of his counsel's judgment that he might have won the case before a jury. Perhaps so, but due process requirements are not to be stretched in order to achieve particular instances of justice or to rectify isolated instances of apparent injustice. Their strength lies in their long run, universal applicability and is diluted when due process arguments are pressed into service as substitutes for arguments or appeals attacking the sufficiency of evidence supporting a verdict—a contention which the appellant eschewed in this case when he chose to proceed by *habeas*

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[70] *Id.*, at 588.

[71] *Fugate v. Ronin*, 167 Neb. 70, 75, 91 N.W.2d 240 (1958).

[72] Brief for Appellant, p. 30.

corpus rather than by direct appeal to the District Court and the Supreme Court of Nebraska as he could have done. Hard cases still make bad law. And nowhere more so than in the area of constitutional law, where their adverse consequences are so much more difficult to eliminate or cure by action of the people's representatives.

Theory apart, appellant was not constitutionally prejudiced by the prosecutor's decision to proceed against him in the juvenile court. If, on the one hand, this Court should hold that he was entitled to a jury trial in the juvenile court, appellant surely would concede that a decision to proceed against him in that court would have been acceptable to him.[73] If, on the other hand, appellant had no constitutional right to a jury trial in a juvenile court, the exercise of discretion by the prosecutor in this case would appear to fall well within the categories of prosecutor or executive discretion universally upheld by American courts even before the nation was founded and well recognized at common law. *United States v. Cox*, 342 F.2d 167, 192 (C.A. 5, 1965); *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill., 1945).[74]

A number of states, of which Nebraska is one, give concurrent jurisdiction over juveniles to their criminal and juvenile courts, at least as to those over a certain age.[75] In such states, a prosecutor has the discretion to choose in which court to proceed. The Attorney General of the United States is given analogous discretionary authority by the

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[73] Brief for Appellant, p. 30.

[74] *Prosecutor's Discretion* (Note), 103 Penn. L.R. 1057 (1955); Baker and DeLong, *The Prosecuting Attorney–Powers and Duties in Criminal Prosecutions*, 24 J. Criminal Law & Criminology 1025 (1934).

[75] Among these states are: Alabama–Ala. Code, Tit. 13, ¶ 365 (1958); Illinois–Smith-Hurd, Ill. Rev. Stat. Ch. 37, ¶ 702-7 Supp. (1965); Iowa–*State v. Steuve*, ___ Ia. ___, 150 N.W.2d 597 (1967); and Georgia–*Jackson v. Balkcom*, 210 Ga. 412, 80 S.E.2d 319 (1954).

Federal Juvenile Delinquency Act. Under that statute, a juvenile charged with a violation of the law of the United States, with certain exceptions, "shall be proceeded against as a juvenile delinquent if he consents to such prosecution, unless the Attorney General *in his discretion* has expressly directed otherwise." (Italics supplied.)[76] Although one recent commentator implies doubt about the constitutionality of the discretion vested in the Attorney General by the Federal Juvenile Delinquency Act,[77] his "final and absolute" authority to do so has been sustained in several cases. *Raimirez v. United States*, 238 F. Supp. 763, 764 (S.D. N.Y., 1965); *United States v. Verra*, 203 F. Supp. 87, 91 (S.D. N.Y., 1962).[78]

The purpose of the Federal Juvenile Delinquency Act in removing young people from criminal court proceedings, unless the Attorney General expressly directs otherwise, was to "avoid prosecution of juveniles as criminals." *Cotton v. United States*, 355 F.2d 480, 481 (C.A. 10, 1966). The same purpose underlies the Nebraska statute challenged on this appeal. *Miller v. Bryant*, 94 Neb. 754, 144 N.W. 804 (1913). The *amicus* concedes *arguendo* that a prosecutor's unreviewable decision to try a juvenile as a criminal, thus departing from the basic purpose of juvenile court statutes throughout the country, might give rise to constitutional difficulties if this Court's opinion in *Kent v. United States*, 383 U.S. 541, is read in a broad light. In the instant case, however, the prosecutor's decision achieved a result in accordance with the major purpose or tenet of the Nebraska juvenile court statute. No procedural rights of the appellant were violated by the prosecutor's decision, unless it can be successfully maintained that the rationale of this Court's decision in *Kent* required that the prosecutor first have

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[76] 52 Stat. 557 (1948); 18 U.S.C. 5032 (1969).

[77] *Schornhorst, supra* note 69, p. 598.

[78] See also *Barnes v. Pescor*, 68 F. Supp. 127, 128 (W.D. Mo., 1946), appeal dismissed, 158 F.2d 800 (C.C.A. 8, 1946).

held an adversarial hearing before deciding not to charge a child as a criminal.

Kent v. United States, supra, is distinguishable from this case in several significant particulars. First, as already noted, we are dealing with a situation in which a juvenile was not charged and tried in a criminal court. In *Kent,* of course, precisely the opposite was the case. The decision which was attacked there deprived a child of the special protections otherwise afforded him by the District of Columbia juvenile court statute. Secondly, although the cases[79] and the commentators[80] disagree, the more persuasive view would seem to be, as Dean Paulsen has colorfully concluded, that *Kent* did "not actually hurl constitutional thunderbolts at the nation's juvenile courts . . . ."[81] In *Kent,* this Court construed a waiver provision of the District of Columbia Code. In doing so, Mr. Justice Fortas was careful to state that: "The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia provide an adequate basis for decision of this case, and we go no further." 383 U.S., at 556.[82] However, even if *Kent* must be taken as a case having constitutional overtones, if not of constitutional dimension, an important

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[79]Illustrative cases finding no constitutional mandate in *Kent* are: *State v. Acuna,* 78 N.M. 119, 428 P.2d 658, 659 (1967); *Cradle v. Peyton,* 208 Va. 243, 156 S.E.2d 874 (1967); and *State v. Hance,* 2 Md. App. 162, 233 A.2d 326, 329 (1967). To the contrary are: *Madera v. Board of Education,* 267 F. Supp. 356, 370 (S.D.N.Y., 1967); *Summers v. State,* ___ Ind. ___, 230 N.E.2d 320 (1967); *State v. Owens,* 197 Ka. 212, 416 P.2d 259 (1966); and *Dillenburg v. Maxwell,* 70 Wash. 2d 325, 422 P.2d 783 (1967).

[80]Compare Dean Paulsen's analysis as set out in *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 Supreme Court Review, p. 167, with Professor Schornhorst's views, *supra* note 69.

[81]Paulsen, *supra* note 80, p. 186.

[82]See also *In Re Gault,* 387 U.S. 1, 66; *A Due Process Dilemma: Juries for Juveniles* (Note), 45 N.Dak. L.R. 251, 253 (1967).

distinction between it and this case remains. In *Kent*, the Court was construing a statute that conferred authority to waive juvenile jurisdiction on a court, authority which permitted the court "after full investigation" to forego its "exclusive jurisdiction."[83] The statute vested what reasonably must be characterized as a quasi-judicial function in a judicial tribunal. It has long been the law that where a quasi-judicial proceeding, including a hearing, either expressly provided for or fairly implied, is required by statute as a prelude to an order or adjudication affecting legal rights, even though there may have been no constitutional requirement to provide such proceeding or hearing in the first instance, the procedures observed must be fair.[84] Nebraska, however, has not vested any authority in its juvenile courts to waive jurisdiction. It allows juvenile court jurisdiction to exist concurrently with that of the regular criminal courts. Election of the jurisdiction in which to proceed against a juvenile has not been made a judicial function or responsibility; it remains an executive or prosecutor's obligation. Like the discretion possessed by prosecutors in other areas of the criminal law, it is a responsibility which certainly can be abused and misused. However, the remedy, as in other cases of abuse of the prosecution function, lies with the people who elect the prosecutor or who elect the state officer who appoints him. It has not been entrusted to the judicial power.[85]

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[83] 11 D.C. Code 907, 914 (1961); now 11 D.C. Code 1531, 1533 (Supp., 1965).

[84] *Morgan v. United States*, 304 U.S. 1, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123; *Greene v. McElroy*, 360 U.S. 474.

[85] As previously argued in this brief, however, there is a Nebraska statute which would seem to afford a statutory right of judicial review of the prosecutor's decision in electing in which court to proceed against the juvenile. *Supra*, p. 47. Such judicial review rests on a statutory basis; it is not a constitutional requirement.

The *amicus* applauds the salutary effects of this Court's decision in *Kent v. United States, supra.* That decision insists that before a juvenile court surrenders its preferred jurisdiction over juveniles and permits a child to be accused and tried as a criminal, it must adhere to procedures that observe minimum standards of "fundamental fairness." The Council does argue, however, that it would be an unwarranted and invidious extension of the doctrine of Kent to maintain that it requires exercise of a prosecutor's discretion in choosing to proceed against a child in a juvenile court either to be preceded by some type of a quasi-judicial or adversarial hearing or else to be subject to judicial review. Apart from its effect on the states where juvenile and criminal court jurisdiction exist concurrently,[86] it might cast into doubt other, even more critical, categories of prosecutor's discretion traditionally thought to be immune from judicial scrutiny, except as provided by statute. Here, *inter alia*, come immediately to mind the prosecutor's duty: to investigate crime and to initiate prosecution against suspected individuals;[87] to present cases to the grand jury; to file an information charging a person with a crime; to reduce charges when justified; and, frequently, to discontinue or *nolle pros* a charge previously brought.[88] At least one dis-

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[86]See note 75, *supra.*

[87]Courts generally refuse to order a prosecutor to initiate a prosecution on the ground that it is a discretionary act which may not be compelled by mandamus. *Leone v. Fanelli,* 194 Misc. 826, 87 N.Y. Supp. 2d 1950 (Sup. Ct., 1949); *Murphy v. Sumners,* 54 Tex. Crim. 369, 112 S.W. 1070 (1908); *Graham v. Gaither,* 140 Md. 330, 117 A. 858 (1922). Nor has Congress ever challenged acceptance of the same notion with respect to the authority or discretion of federal prosecutors. Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion,* 13 Law & Contem. Prob. 64, 83 (1948).

[88]At common law, an attorney general had absolute power to dismiss a prosecution on his own official responsibility. Clark, Criminal Procedure 122 (2d Ed., 1918); *People v. Newcomber,* 284 Ill. 315, 120 N.E. 244 (1918). The prosecutor's authority to *nolle pros* a case has been restricted or modified by statute in a number of

tinguished law professor is concerned lest *Kent* be taken as a portent looking "toward such radical innovation as to implant an adversary hearing in all official decision-making that may work 'a result of tremendous consequences' to individuals in respect to their freedom . . . ."[89] In contrast, another nationally known legal scholar has just written a book urging precisely such a result.[90]

This *amicus* is reasonably confident that the *Kent* decision was not intended to cast doubt on other types of discretion traditionally exercised by prosecutors in all the states and in the federal system. For that reason, we will not dwell upon the appalling consequences should *amicus'* prediction prove to be wrong. Mr. Justice Jackson whimsically but accurately once remarked that in the United States we believe "in government by lawsuit." Nevertheless, there are limits. The machinery of government simply cannot function properly if the operations of all, or even of many, of its decision making mechanisms must be subject to the condition precedent of holding a judicial type hearing or receiving judicial approval. There is a practical as well as a philosophical basis for the separation of powers doctrine. As Mr. Justice Holmes reminds us:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[91]

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states. Prosecutor's Discretion (Note), 103 Pa. L.R. 1057, 1067 (1955).

[89]Paulsen, *supra*, at 183.

[90]Davis, Discretionary Justice, A Preliminary Inquiry (La. State Univ. Press, 1969). See especially Chs. VI and VII of Professor Davis's provocative book.

[91]*Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270.

CONCLUSION

For the reasons stated in this brief, the *amicus* respectfully suggests that the Court vacate its order noting probable jurisdiction in this case and grant appellee's motion to dismiss the appeal for want of a substantial federal question. Alternatively, it urges that the Court affirm the *per curiam* decision of the Supreme Court of Nebraska.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 15

CLARENCE DEBACKER,

Appellant,

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

Summary of Argument

I.

The fact that *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194, are not retroactive is not an impediment to this Court's deciding that jury trial is to be extended to serious juvenile cases. None of the judges of the Nebraska Supreme Court rested their opinion on the non-retroactivity of *Duncan. DeStefano* v. *Woods,* 392 U.S. 631, was a criminal case and had nothing to do with whether juvenile court "adjudications" are in fact convictions.

II.

No convincing argument has been advanced that juveniles should be deprived of jury trial. Juries are fundamental to the American scheme of justice because of the protection afforded against oppression by the government.

Lawyers for adults routinely decide whether to demand or forego jury trial according to the exigencies of the case and their knowledge of the idiosyncrasies of the trial judge. Juveniles are certainly entitled to a lawyer who does not have one hand tied behind him.

Not all juvenile court judges believe that juveniles are entitled to a watered-down Constitution. Some juvenile court judges in the midst of the problems posed by the rising of juvenile crime believe that the full scale application of due process will be beneficial.

III.

No argument can obscure the fact that appellant has been transferred from the training school and is now in a penal institution. Such a result cannot be called anything other than incarceration for crime. Euphemisms cannot disguise the fact that the juvenile court process is a criminal one when the juvenile is charged with the commission of a felony.

The Constitution was designed to endure through the problems of society and the fact that juvenile crime has become a major problem is no justification for scrapping the vital provisions of a Constitution that endured through a civil war.

ARGUMENT

I.

The Prospective Application of Duncan and Bloom Does Not Proscribe the Application of Their Principles Here.

The National Council of Juvenile Court judges asserts it appears here "solely for the purpose of attempting to present the collective knowledge and experience of its members on issues of obvious importance to the future operation and development of juvenile court justice in the United States."[1] It also says that it has "become the practice of juvenile court judges to seek to place at the service of legislatures and courts of last resort their collective knowledge and experience, in the hope of illuminating areas which are not always fully understood by attorneys, most of whom rarely practice in the juvenile court."[2] Since the "collective knowledge and experience" of some juvenile court judges[3] leads them to conclude that juries are not for juveniles, contrary to the judgment of many attorneys for juveniles who have repeatedly voiced demands for a jury trial in many jurisdictions, it would seem that the Council would present a cogent and persuasive argument demonstrating that the virtues of juvenile court rehabilitation outweigh the obvious injustice of denying a juvenile trial by jury when he and his attorney feel that it is in his best

[1] Council's brief, p. 3.

[2] *Id.*, p. 2.

[3] There is no indication that the Council represents anything like a majority of the juvenile court judges of this country or that the views of juvenile court judges generally are in accord with those of the Council.

interests. Instead of such an argument, the Council urges the Court not to let the other shoe drop.

None of the judges of the Nebraska Supreme Court thought the prospective application of *Duncan*[4] or *Bloom*[5] presented any problem. The majority applied the principles of *Duncan* (A. 29) and the prevailing minority distinguished it on the ground that *Duncan* was a criminal appeal in which the question of delinquency under a juvenile court act was not involved (A. 38). No good reason has been suggested that this Court should be more restrained than the Nebraska Supreme Court in applying the principles of *Duncan* and *Bloom* to the question of whether juries are required in juvenile delinquency proceedings leading to commitment to a state institution. In any event, *DeStefano*[6] does not stand in the way of a determination of the vital issue presented here.

Petitioner Carcerano[7] presented his contention (that Oregon's nonunanimity rule violated the Federal Constitution) in post-conviction proceedings and did not raise it on direct review. Carcerano's case was a criminal case as of course was Duncan's. Petitioner Stefano had been found guilty of criminal contempt as had Bloom. Although we assert that DeBacker's case is governed by the principles of *Duncan* and *Bloom*, DeBacker's case will not be a criminal case so far as the Sixth Amendment right to jury trial is concerned until this Court so holds. If this Court does so hold, it can announce, in this case or in another

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[4] 391 U.S. 145.

[5] 391 U.S. 194.

[6] 392 U.S. 631.

[7] Carcerano's case was decided with DeStefano's.

case which presents the question, whether the *DeBacker* holding is to be retroactive.[8] This court said in *DeStefano* that it would not "reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968 * * *." This holding has nothing to do with whether juvenile court "adjudications" are in fact convictions.

II.

Fundamental Fairness Does Require the Right of a Jury Trial Where Imprisonment of Four or More Years Can Result.

Duncan made clear that the right to be tried by a jury is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge".[9] Surely even the Council in its proposed "standard of fairness to the juvenile within the total context of the juvenile court's quest for the rehabilitative ideal" [10] (whatever that means!), would wish to protect a juvenile against such a prosecutor or judge. If the judges of the Council do not believe that fairness to the juvenile should include such protection, then a better argument could hardly be made for the necessity of placing juries between them and the juveniles in their courts.

The Council asserts the existence of an "understanding that there is a rational basis for procedural differences between juveniles charged with crime and their adult

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[8] We take no position on whether a decision extending jury trial to serious juvenile cases should apply prospectively only.

[9] 391 U.S. 145 at 156.

[10] Council's brief, p. 31.

counterpart."[11] The Council goes on to say that "juveniles are at an age when the enticements of crime are most alluring, when their sense of right and wrong is at its peak, and when their susceptibility to reform is the greatest."[12]

Without stating the basis for the alleged "understanding" that procedural differences between juveniles and adults charged with crime are called for, the Council vaults to a naked conclusion that "(These) sociological and psychological findings, among others, gave birth to, and still justified, the less formalistic procedural functioning of the juvenile court."[13] The Council says nothing to indicate that the availability of jury trial will interfere with the juvenile court's "quest for the rehabilitative ideal" unless of course the Council's idea of the "rehabilitative ideal" does not include a recognition of the juvenile's right to resist, by any legitimate methods his counsel deem appropriate, the imposition of compulsory rehabilitation.

The Council concedes that "some juvenile judges are bound to be insensitive" and asserts that "others are equally certain to be compassionate and experienced."[14] The Council of course does not know which of its juvenile judges are insensitive, but the attorney for the juvenile is apt to be acutely aware of the qualities of his local juvenile judge and the Council does not state any reasons why a juvenile's attorney, faced with an insensitive judge, should not be allowed to demand a jury. Deciding whether or not to waive a jury is a routine professional decision frequently made by experienced attorneys familiar with

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[11] *Id.*, p. 30.

[12] *Id.*, p. 30.

[13] *Id.*, p. 30.

[14] *Id.*, p. 36.

the local courts and the facts and circumstances of the case involving their particular client. The Council gives no reason why a juvenile is not entitled to all of the professional skill and judgment of his attorney, or why a juvenile's attorney cannot utilize the same legitimate techniques in the defense of a juvenile case as he would in the defense of an adult.

The Council says the "seriousness of the offense is a relevant gauge of the expansiveness of the due process requirements which must control."[15] It is pointed out that appellant's maximum sentence as a juvenile would be four years and that the maximum sentence if he had been tried as an adult would be twenty years. The Council recognizes that *Duncan* indicates that six months is the dividing line between a serious and petty offense but asserts that *Duncan's* standard is inappropriate in a juvenile court. In support Council argues that "confinement is not the only measure that the community uses to illumine its view of the seriousness of an offense."[16] Council does not, however, point out any measures besides confinement used by the community to determine the seriousness of an offense and the individual confined doubtless uses no other measure than the length of his confinement in assessing his view of the seriousness of the offense.

The Council uses the usual argumentative technique of viewing with alarm the possible proliferation of collateral issues not remotely involved in but alleged to be the inevitable accompaniment of a decision one seeks to avoid. Council is concerned that if a juvenile has a right to a jury trial he may not be able to waive it. The books are

[15] *Id.*, p. 37.

[16] *Id.*, p. 37.

full of decisions on the waiver of constitutional rights and this should present no earth-shaking problem. Council's concern as to how jurors are to be selected, challenged and instructed[17] can be laid to rest by legislatures under the control of the judiciary if constitutional limits be transcended. If more troublesome questions exist, this Court sits to resolve them.

Appellant's doubt that the Council's position is that of the typical juvenile court judge is reinforced by the comments of individual juvenile court judges. A distinguished judge, Orman W. Ketcham, Associate Judge, Juvenile Court of the District of Columbia, addressed himself to "The Effects of Due Process on the Juvenile Offender."[18] Judge Ketcham opened his paper by saying:

> "Our difficulty really lies in how to achieve due process of law for juveniles—not whether it is beneficial. I really couldn't live with myself as a judge if I didn't believe that fairness and justice were *always* a positive value. The wonder is that due process of law was largely denied to juveniles under the guise of the parens patriae doctrine, for more than half a century."

Judge Ketcham noted that a juvenile is entitled to a trial by "an impartial trier of the facts" and "this means either an unbiased judge or a jury of his peers."

Judge Ketcham's observations on the type of arguments made by the Council are illuminating. He states:

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[17] *Id.*, p. 38.

[18] Released at National Institute on Crime and Delinquency. Statler-Hilton, Boston, Mass., June 9, 1969.

"Many cries of havoc have emanated from judges, administrators and social workers in juvenile courts concerning the new and time-consuming burdens that the provision of due process of law for juveniles has occasioned. But the substance of our law should not be dependent upon the administrative convenience of our court system. In most urban courts today the time devoted to a juvenile's case has become notoriously short. New procedures required by *Gault* will now assure the juvenile a larger segment of his 'day in court.'

"Those who expound the 'parens patriae' philosophy believe that the introduction of due process of law will diminish the informality which has been the juvenile court's hallmark and circumscribe the discretion of the juvenile court judge. True. But those features have been tried and found wanting.

"Today's topic for discussion is the effect of the introduction of these procedures upon the juvenile himself, rather than their effect upon the juvenile justice system or its philosophy.

"The first result of the advent of due process is to assure the juvenile a judicial hearing the outcome of which is *NOT* foreordained. It used to be the boast of the most jingoistic members of the 'father knows best' philosophy that less than one-tenth of one percent of all juveniles charged ever denied their offenses. Such sudden candor and contrition from antisocial and alienated youth is so unbelievable that I submit that juveniles accused of offenses in such courts were never given any opportunity to deny the charges. The presumption of their guilt was well nigh irrebuttable. (The title for this panel discussion unconsciously expresses this characteristic approach by calling the subjects 'juvenile offenders' even before adjudication.)

"In our American system we take pride in operating a government of laws, not of men. To set an example of this principle, due process of law should afford the juvenile the opportunity to dispute the factual assertions of policemen, school teachers, social workers and even his parents. This is granted not because all such adults are untrustworthy, but because some are. After a fair and impartial judicial hearing, if the allegations are not accurate, the juvenile has been vindicated through a system of justice which rates high in his esteem. If the facts of the charge are correct, their careful establishment by legal rules will usually convince the juvenile that truth and justice are immutable, rather than dependent upon his cooperation or lack of it. Either way I believe that providing a juvenile with his proper day in court is a very therapeutic process which builds respect for law and justice. * * *.

* * * * *

"At a time in our history when public confidence in the law seems to be declining, it is important that our youth—more than a third of our population is under 21—should be educated in fair legal procedures by the operation of due process of law within our juvenile justice system. A juvenile who is given effective assistance by his attorney will have the entire legal process explained and interpreted to him—the pre-adjudication process, the trial, the judge's decision and the dispositional decree. This should, and usually does, enhance the understanding of the youth and his parents for our judicial system and the law of the land. The example of a juvenile court that operates under the restraint of due process of law may renew in our youth

respect for our law enforcement system and the judicial process.

"Before the advent of due process of law in the juvenile court, the only limit which the law placed upon the 'parens patriae' power of the judge was the requirement that he act in 'the best interests of the juvenile' —a highly subjective and almost unchallengeable maxim. Due process of law now substitutes established legal procedures for unbridled judicial discretion. Informality and the 'arm-around-the-shoulder' approach to juvenile justice is being replaced by an arm's-length, due process system of justice. Even adversary proceedings are available upon demand. The results should be less folksy, but lots fairer.

"The post-*Gault* system sharply diminishes the paternalistic attitude of juvenile courts, which has been so hated by a majority of youth. Instead of a juvenile receiving justice (or leniency) as a matter of grace or adult 'noblesse oblige,' he is now entitled to the equal protection of the law just as an adult would be. An alienated juvenile will no longer be subject to arbitrary police or judicial control. He will be treated as a first-class citizen with a full measure of individual rights. Thus, there is emerging the principle that each young person is an individual entitled for his own sake to civil rights and equal justice under law. Instead of the dominant father and the dependent child prototypes, the new philosophical approach stresses both equal opportunity and equal responsibility for each juvenile. Since the stated goal of our socialization and maturation process is the creation of mutual respect between adult individuals, this new principle of equality may well lay the groundwork for good citizenship

which will last long after the relationship between probation officer and juvenile offender is forgotten. * * *

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"One of the canards most frequently stated about the introduction of due process of law into juvenile courts is that the juvenile is prevented from receiving the rehabilitative treatment he needs to save him from a criminal career. This is like the well-known, but improper, question 'When did you stop beating your wife?' It begs several questions.

"As an attorney for such a juvenile there are three vital subsidiary questions to be asked before answering the ultimate one:

1. Has the juvenile actually done the offense which is supposed to demonstrate his need for rehabilitation?

2. If he has done the offense, is there a recognized behavioral science procedure or treatment that will correct his fault and save him from a criminal career?

3. If he has done the offense and there is a recognized treatment, can the juvenile court before which he will appear provide such treatment?

"If the answer to these three questions is 'Yes', most lawyers will persuade the juvenile to acknowledge the offense and submit to the jurisdiction of the juvenile court. If any of the answers are negative, the attorney should not 'throw the juvenile upon the mercy of the court.' To protect his client's interest, he should contest the court's jurisdiction.

"Immediately there comes to mind the juvenile who, in the eyes of his attorney and any impartial observer,

did commit the offense but refuses to admit it. (This is much more characteristic than the case of the juvenile who admits his fault but whose attorney insists upon a trial.) In my opinion, the provision of due process of law for such a recalcitrant juvenile is most therapeutic. He should (and will if the police cooperate) be proven guilty of the crime despite his protestations of innocence. He will have had his day in court and have learned that law enforcement can and does arrive at the truth by fair but effective procedures. He will, I believe, be several steps further down the road to rehabilitation than if he had—for the administrative convenience of the judiciary—been persuaded against his wishes to admit the offense and forgo his day in court.

"To sum up in one sentence: I am firmly convinced that the extension of due process of law to juveniles—however burdensome or inconvenient it may be to police, social workers, judges and juvenile court personnel—is an unmitigated benefit to the juveniles concerned."

Professor Monrad G. Paulsen,[19] a frequent commentator on juvenile law, says: "Due process, if it is such a precious gift, should not be withheld from children."[20] Paulsen quotes Mr. Justice Frankfurter: "The history of American freedom is, in no small measure, the history of procedure."[21]

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[19] Professor of Law, Columbia University.

[20] The 1967 Supreme Court Review, "The Constitutional Domestication of the Juvenile Court", p. 241.

[21] *Malinski* v. *New York*, 324 U.S. 401, 414 (1945).

Paulsen notes that Judge Julian Mack's 1909 concept of the juvenile court as being one which furnished kindly assistance is not particularly applicable today.[22] He says:

> "This perception of the juvenile court sees an institution designed for a fraternal community in which substantially all persons are either members or pledges. This is not the situation in the crisis-ridden cities of today. The problems of the slum-bred delinquent will not yield to 'kindly assistance.' District Judge Constance Motley has described the children who most often are involved in school suspension hearings: 'Members of "multi-problem families" * * * the new aliens in our midst—the urban pool * * * These children emerge, in the main, from the quagmire of urban poverty * * * '".

Paulsen further observes that:

> "Divisions in the urban community are deep. Formal procedure, to some extent, may be able to dispel mistrust. The judge who is supplied with specific rules regarding the fundamentals of fairness and who follows them may lessen the tensions that both he and the respondents feel. The adversary system that many see as a machine to sow discord does give the dispossessed a voice, and a time and place to be heard, and may offer a sense of participation in the decision-making that can affect respondents mightily. Ironically, the adversary system may provide some badly needed glue for the preservation of unity."[23]

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[22] N. 20 *Id.* at 242.

[23] N. 20 *Id.* at 243.

III.

The Reasonable Doubt Standard Must Be Applied in Juvenile Court When the Commission of a Felony Is in Issue Unless the "Civil" Label Is to Be Revitalized.

On July 23, 1969, the Texas Supreme Court in *Santana* v. *State,* No. B-1132, 5 Cr.L. 2400, overturned the decision of the Texas Court of Civil Appeals[24] that the reasonable doubt standard is required in juvenile proceedings. Justice Pope, joined by Justices Smith and Steakley, dissented, noting that:

> "In proper perspective, '* * * courts do not solve problems; they resolve issues. As long as it remains a court, the juvenile court must be limited to this role.' Tenney, The Utopian World of Juvenile Courts, Vol. 383, the annals of the American Academy of Political and Social Science."[25]

Justice Pope pointed out that the criticism of the juvenile courts is not new, quoting Paul Tappen who wrote in 1949 in Juvenile Delinquency:

> "The presumption is commonly adopted that since the State has determined to protect and save its wards, it will do no injury to them through its diverse officials so that these children need no due process protections against injury. Several exposures to court; a jail remand of days, weeks, or even months; and a long period in a correctional school with young thieves; muggers, and murderers—these can do no conceivable harm if the State's purpose be beneficent and the pro-

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[24] 431 S.W. 2d 558 (1968).

[25] Dissenting opinion, p. 4.

cedure be 'chancery'. Children are adjudicated in this way every day without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the State's good intentions as parens patriae." [26]

In similar vein, Justice Pope quoted Norval Morris, Professor of Law and Criminology at the University of Chicago, speaking at a program sponsored by The Institute of Continuing Legal Education, published in the volume entitled, Gault: What Now For The Juvenile Court? who said:

"What I have anxiety about are the reality problems which develop when these types of rescue operations become institutionalized. What happens is that rescue operations are likely to ignore the preferences of those who are to be rescued. * * * If an inquisitorial, non-adversary system is right for children, why is it not right for adults? If benevolence is what guides us, why should benevolence stop short with children? The case was not easy to make even before Gault, but certainly after Gault it is impossible." [27]

Justice Pope's conclusion is eloquent:

"Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic, one could have reasoned before Gault that the benefits of treatment accorded a juvenile are so helpful and beneficial to the

[26] *Id.*, p. 5.

[27] *Id.*, p. 5.

juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant, or by tolerating his self-incrimination. The rights which Gault accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different." [28]

Conclusion

The addiction to euphemisms is hard to cure. "Telling like it isn't" is the stock in trade of those who believe the end justifies the means. The founders of the Third Reich found it necessary to set up new tribunals, euphemistically designated as "People's Courts", when the existing judicial system was inadequate to the task of the rehabilitation of the political philosophies of those Germans who were reluctant to be led into the new tomorrow. Dictators have found it helpful to style themselves as "Liberator" and "Benefactor".

"* * * (The) law does not pivot on labels * * *." [29] and appellant's cell in the Nebraska State Reformatory is not labeled with an apartment number. The most ingenious arguments cannot obscure the simple fact that appellant has been transferred from the Training School to a penal institution and that he is there without benefit of jury trial or the criminal standard of proof.

This Court is told that the problem of juvenile crime is such that provisions of the Constitution should be suspended in an effort to solve it. Over a century ago this

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[28] *Id.*, p. 12.

[29] *Powell* v. *McCormack*, 395 F.2d 577, 592.

Court was likewise told that the problems of a Union torn by Civil War were such that Constitutional rights had to be suspended. Mr. Justice Davis' answer thunders down the corridors of history:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." [30]

Respectfully submitted,

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[30] *Ex parte Milligan*, 4 Wall. 2, 119-21.

DEBACKER *v.* BRAINARD, SHERIFF

APPEAL FROM THE SUPREME COURT OF NEBRASKA

No. 15. Argued October 13–14, 1969—
Decided November 12, 1969

1. Appellant juvenile's challenge in habeas corpus proceeding on ground that he was unconstitutionally deprived of his right to trial by jury is inappropriate for resolution by this Court since the hearing before a Nebraska juvenile court judge at which appellant was adjudged a delinquent was conducted before this Court's decisions in *Duncan v. Louisiana*, 391 U. S. 145, and *Bloom* v. *Illinois*, 391 U. S. 194, which were held in *DeStefano* v. *Woods*, 392 U. S. 631, to apply only prospectively, and appellant would therefore have had no constitutional right to a jury trial had he been tried as an adult in a criminal proceeding.
2. It is not appropriate for this Court to decide whether Nebraska law providing for proof of delinquency in a juvenile proceeding under a preponderance of the evidence standard violates due process requirements where no objection to that standard was made at the hearing by appellant, who took no direct appeal, and his counsel acknowledged that the evidence was sufficient to support the delinquency finding even under a reasonable doubt standard.
3. Because standing alone the issue could not be subject to review by an appeal, this Court declines, in view of the barrenness of the record, to exercise its certiorari jurisdiction to pass on appellant's contention that the prosecutor's assertedly unreviewable discretion under Nebraska case law whether to proceed against appellant in juvenile court rather than in ordinary criminal proceedings violated due process.

183 Neb. 461, 161 N. W. 2d 508, appeal dismissed; certiorari dismissed as improvidently granted.

William G. Line, by appointment of the Court, 394 U. S. 914, argued the cause and filed briefs for appellant.

Richard L. Kuhlman argued the cause for appellee. With him on the brief was *Melvin Kent Kammerlohr*, Assistant Attorney General of Nebraska.

Alfred L. Scanlan, by special leave of Court, argued the cause and filed a brief for the National Council of Juvenile Court Judges as *amicus curiae.*

Thomas C. Lynch, Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Gloria F. DeHart,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae.*

PER CURIAM.

After a hearing before a juvenile court judge, appellant DeBacker was found to be a "delinquent child" [1] and ordered committed to the Boys Training School at Kearney, Nebraska.[2] DeBacker did not seek direct review of his commitment, but instead sought state habeas corpus. The Nebraska District Court dismissed appellant's petition, a divided Nebraska Supreme Court affirmed,[3] and last Term we noted probable jurisdiction over the present appeal, 393 U. S. 1076. Because we find that resolution of the constitutional issues presented by appellant would not be appropriate in the circum-

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[1] "Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." Neb. Rev. Stat. § 43-201 (4): Appellant was charged with having a forged check in his possession with the intent to utter it as genuine, an act which for an adult would be forgery under Neb. Rev. Stat. § 28-601 (2).

[2] Appellant was 17 when committed, and it appears that under Nebraska law he could be kept in the training school until his 21st birthday.

[3] Four of the seven justices of the Nebraska Supreme Court thought the Nebraska statutory provisions which require that juvenile hearings be without a jury, Neb. Rev. Stat. § 43-206.03 (2), and be based on the preponderance of the evidence, Neb. Rev. Stat. § 43-206.03 (3), were unconstitutional. The Nebraska Constitution provides, however, that: "No legislative act shall be held unconstitutional except by the concurrence of five judges." Neb. Const., Art. V, § 2.

stances of this case, the appeal is dismissed. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

1. Appellant asks this Court to decide whether the Fourteenth and Sixth Amendments, in light of this Court's decisions in *Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194; and *In re Gault*, 387 U. S. 1, require a trial by jury in a state juvenile court proceeding based on an alleged act of the juvenile which, if committed by an adult, would, under the *Duncan* and *Bloom* cases, require a jury trial if requested. In *DeStefano* v. *Woods*, 392 U. S. 631, we held that *Duncan* and *Bloom* "should receive only prospective application" and stated that we would "not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in *Duncan* v. *Louisiana* and *Bloom* v. *Illinois*." 392 U. S., at 633, 635. Because appellant's juvenile court hearing was held on March 28, 1968—prior to the date of the decisions in *Duncan* and *Bloom*—appellant would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal proceeding. It thus seems manifest that this case is not an appropriate one for considering whether the Nebraska statute which provides that juvenile hearings be "without a jury," Neb. Rev. Stat. § 43-206.03 (2), is constitutionally invalid in light of *Duncan* and *Bloom*.[4]

[4] Although a comment made by appellant's counsel at oral argument before this Court (in response to a question) suggests reliance also on the Equal Protection Clause for the claim that a jury trial was constitutionally required (Tr. 5), an examination of the record clearly reveals that this was not any part of the basis on which probable jurisdiction was noted here. Appellant made no equal protection claim before the juvenile court, in his petition for habeas corpus to the state courts, or in his jurisdictional statement or brief in this Court. The Sixth Amendment as reflected in the Fourteenth was the exclusive basis for appellant's claim that he had a right to a jury trial. (See "Questions Presented" in Jurisdictional Statement 3–4, and

2. Appellant next asks this Court to decide whether the preponderance of the evidence standard for burden of proof in juvenile court proceedings, required by Neb. Rev. Stat. § 43-206.03 (3), satisfies the Due Process Clause of the Fourteenth Amendment. However, at the appellant's juvenile court hearing, his counsel neither objected to the preponderance of the evidence standard, nor asked the judge to make a ruling based on proof beyond a reasonable doubt. In explaining why he did not seek a direct appeal from the juvenile court's determination that appellant had committed the act upon which rested the delinquent child finding, appellant's counsel stated at oral argument before this Court:

> "[I]t has been pointed out that I did not attack the sufficiency of the evidence.
>
> "Of course, the reason for that is obvious. The evidence is more than sufficient to sustain a conviction of what he did. An appeal on the sufficiency of the evidence would have been close to frivolous." (Tr. 41–42.)

Later in oral argument counsel acknowledged that "[n]o matter what the standard was . . . [o]ur evidence just isn't insufficient." (Tr. 47.) And when specifically asked whether "[t]he evidence was sufficient even under a reasonable doubt standard," counsel responded: "Even under a reasonable doubt standard . . . ." (Tr. 47.)

Given this commendably forthright explanation by appellant's counsel, this case is not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings.[5]

Appellant's Brief 2.) Nor has any of the Nebraska courts below passed on any equal protection claim.

[5] This Court has recently noted probable jurisdiction to consider this issue in *In re Winship* (No. 85, Misc.), probable jurisdiction noted, *post*, p. 885.

3. Appellant finally asks us to decide whether due process is denied because, as it is claimed, the Nebraska prosecutor had unreviewable discretion whether he would proceed against appellant in juvenile court rather than in ordinary criminal proceedings. The record shows (1) that appellant did not make this contention before the juvenile court judge; (2) that appellant raised the issue in his habeas corpus petition but that it was not passed on by the Nebraska District Court; (3) that appellant did not press the District Court's failure to consider this issue in his appeal to the Nebraska Supreme Court, and made only passing reference to the issue in his brief to that court; and (4) that the opinions of the Nebraska Supreme Court did not pass on the issue, or even refer to the contention. Given the barrenness of the record on this issue, in the exercise of our discretion, we decline to pass on it. So far as we have been made aware, this issue does not draw into question the validity of any Nebraska statute.[6] Therefore, it could not, standing alone, be subject to review in this Court by way of an appeal. See 28 U. S. C. § 1257 (2). "[I]nsofar as notation of probable jurisdiction may be

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[6] In his petition for state habeas corpus, appellant did not allege as to this issue that any Nebraska statutory provision was invalid. Instead he claimed: "Petitioner is deprived of his liberty under the Fourteenth Amendment of the Constitution of the United States when his right to a jury trial and the protective procedures of the criminal code are left to depend on the uncontrolled discretion of the prosecutor as to whether petitioner should be proceeded against in juvenile court or should be informed against in District Court under the provisions of the code of criminal procedure." If it can be fairly said that the prosecutor's discretion under Nebraska law is "uncontrolled," or not subject to review, this is not because of any explicit statutory provision making it such, cf. Neb. Rev. Stat. § 43-205.04, but because of language in Nebraska case law. See *State* v. *McCoy*, 145 Neb. 750, 18 N. W. 2d 101 (1945); *Fugate* v. *Ronin*, 167 Neb. 70, 75, 91 N. W. 2d 240, 243-244 (1958).

regarded as a grant of the certiorari writ" as to this issue, we dismiss such writ as improvidently granted. *Mishkin* v. *New York*, 383 U. S. 502, 513.

For the foregoing reasons this appeal is

Dismissed.

MR. JUSTICE BLACK, dissenting.

For the reasons set forth herein and in the dissenting opinion of my Brother DOUGLAS, I dissent and would reverse the judgment below.

In February 1968 appellant, who was then 17 years old, was charged under the laws of Nebraska with being a "delinquent child" [1] because he had a forged bank check which he intended to use for his own purposes.[2] At the hearing on this charge he asked for a jury trial, arguing that this was a right guaranteed him by the Sixth Amendment to the Constitution and that a statute prohibiting juries in "delinquency" proceedings [3] was therefore unconstitutional.

This Court in *In re Gault*, 387 U. S. 1 (1967), held that juveniles charged with being "delinquents" as a

[1] Neb. Rev. Stat. § 43-201 (4) provides that: "Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance."

[2] The State charged that appellant "unlawfully, feloniously and knowingly [had] in his possession and custody a certain false, forged and counterfeited bank check . . . with the intent . . . to utter and publish said false, forged and counterfeited bank check as true and genuine, knowing the same to be a false, forged and counterfeited bank check, and with the intent then and there and thereby to prejudice, damage and defraud . . . , well knowing the same to be falsely made, forged and counterfeited, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska." App. 1-2. It is undisputed that such acts constitute the crime of forgery under state law. Neb. Rev. Stat. § 28-601 (2).

[3] Neb. Rev. Stat. § 43-206.03 (2) provides that juvenile hearings "shall be conducted by the judge without a jury in an informal manner . . . ."

result of committing a criminal act were entitled to certain constitutional safeguards—namely, notice of the issues involved, benefit of counsel, protection against compulsory self-incrimination, and confrontation of the witnesses against them. I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world.

The Court here decides that it would not be "appropriate" to decide this issue in light of *DeStefano* v. *Woods*, 392 U. S. 631 (1968). That case held that the Sixth Amendment right to a jury trial—made applicable to the States in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968)—did not apply in state proceedings held prior to May 20, 1968. MR. JUSTICE DOUGLAS and I dissented in that case as we have in every case holding that constitutional decisions would take effect only from the day they were announced.[4] I think this doctrine of prospective-only application is nothing less than judicial amendment of the Constitution, since it results in the Constitution's meaning one thing the day prior to a particular decision and something entirely different the next day even though the language remains the same. Under our system of government such amendments cannot constitutionally be made by judges but only by the action of Congress and the people. Depriving defendants of jury trials prior to *Duncan* violated the Constitution just as much as would similar deprivations after

[4] *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965) (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966) (dissenting opinion); *Stovall* v. *Denno*, 388 U. S. 293, 302, 303 (1967) (dissenting opinions); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (dissenting opinion); *Halliday* v. *United States*, 394 U. S. 831, 835 (1969) (dissenting opinion); see also *Desist* v. *United States*, 394 U. S. 244, 254 (1969) (concurring in judgment).

that decision, yet this Court treats these equal deprivations with clearly unequal justice. I cannot agree to such refusals to apply what appear to me to be the clear commands of the Constitution.

MR. JUSTICE DOUGLAS, dissenting.

In *DeStefano* v. *Woods*, 392 U. S. 631, 635, I stated my view that the decisions in *Duncan* v. *Louisiana*, 391 U. S. 145, and *Bloom* v. *Illinois*, 391 U. S. 194, which guaranteed to adults in serious criminal cases and contempts the right to a trial by jury, should be given retroactive effect.* In light of this view, I am unable to join the Court's *per curiam* opinion in this case, holding that because appellant's juvenile court hearing was held prior to the date of the decisions in *Duncan* and *Bloom* the Court is precluded from deciding appellant's right to a jury trial.

I would reach the merits and hold that the Sixth and Fourteenth Amendments require a jury trial as a matter of right where the delinquency charged is an offense which, if the person were an adult, would be a crime triable by jury. Such is this case, for behind the facade of delinquency is the crime of forgery.

As originally conceived, the juvenile court was to be a clinic, not a court; the judge and all of the attendants were visualized as white-coated experts there to supervise, enlighten, and cure—not to punish.

These white-coated people were surrogates, so to speak, of the natural parent. As stated in one of the leading cases:

> "To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer

*This has been my position with respect to all comparable constitutional decisions. See, *e. g.*, *Desist* v. *United States*, 394 U. S. 244, 255–256 (dissenting opinion); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (dissenting opinion), and cases cited therein.

years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved." *Commonwealth* v. *Fisher*, 213 Pa. 48, 53, 62 A. 198, 200 (1905).

This new agency—which stood in the shoes of the parent or guardian—was to draw on all the medical, psychological, and psychiatric knowledge of the day and transform the delinquent. These experts motivated by love were to transform troubled children into normal ones, saving them from criminal careers.

Many things happened which prevented this dream from becoming a widespread reality. First, municipal budgets were not equal to the task of enticing experts to enter this field in large numbers. Second, such experts as we had, notably the psychiatrists and analysts, were drawn away by the handsome fees they could receive for rehabilitating the rich. Third, the love and tenderness alone, possessed by the white-coated judge and attendants, were not sufficient to untangle the web of subcon-

scious influences that possessed the troubled youngster. Fourth, correctional institutions designed to care for these delinquents often became miniature prisons with many of the same vicious aspects as the adult models. Fifth, the secrecy of the juvenile proceedings led to some overreaching and arbitrary actions.

As Mr. Justice Fortas stated in *Kent* v. *United States*, 383 U. S. 541, 556: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."

In *Kent*, the Court held that a valid waiver of the "exclusive" jurisdiction of the Juvenile Court of the District of Columbia required "a hearing, including access by . . . counsel to the social records and probation or similar reports which presumably are considered by the court, and . . . a statement of reasons for the Juvenile Court's decision." *Id.*, at 557. Although the opinion in that case emphasized that "the basic requirements of due process and fairness" be satisfied in such proceedings, *id.*, at 553, the decision itself turned on the language of a federal statute.

The first expansive treatment of the constitutional requirements of due process in juvenile court proceedings was undertaken in *In re Gault*, 387 U. S. 1. That case involved a 15-year-old boy who had been committed by an Arizona juvenile court to the State Industrial School "for the period of his minority, unless sooner discharged by due process of law" for allegedly making lewd telephone calls. The Court in *Gault* abandoned the view that due process was a concept alien to the philosophy and work of the juvenile courts. Mr. Justice Fortas, speaking for the Court, stated: "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.*, at 28. The Court held that a juvenile is entitled to adequate and timely notice

of the charges against him, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.

Since the decision in *Gault*, lower courts have divided on the question whether there is a right to jury trial in juvenile proceedings. Those courts which have granted the right felt that it was implicit in *Gault*. *Nieves* v. *United States*, 280 F. Supp. 994 (D. C. S. D. N. Y. 1968); *Peyton* v. *Nord*, 78 N. M. 717, 437 P. 2d 716 (1968); *In re Rindell*, 2 BNA Cr. L. 3121 (Providence, R. I., Fam. Ct., Jan. 1968). Those who have denied the right have reasoned either that jury trial is not a fundamental right applicable to the States or that it is not consistent with the concept of a juvenile court. *People* v. *Anonymous*, 56 Misc. 2d 725, 289 N. Y. S. 2d 782 (Sup. Ct. 1968); *Commonwealth* v. *Johnson*, 211 Pa. Super. 62, 234 A. 2d 9 (1967). *Duncan* and *Bloom* have negated the former reason. Whether a jury trial is in conflict with the juvenile court's underlying philosophy is irrelevant, for the Constitution is the Supreme Law of the land.

Given the fundamental nature of the right to jury trial as expressed in *Duncan* and *Bloom*, there is, as I see it, no constitutionally sufficient reason to deprive the juvenile of this right. The balancing of the rehabilitative purpose of the juvenile proceeding with the due process requirement of a jury trial is a matter for a future Constitutional Convention.

The idea of a juvenile court certainly was not the development of a juvenile criminal court. It was to have a healthy specialized clinic, not to conduct criminal trials in evasion of the Constitution and Bill of Rights. Where there is a criminal trial charging a criminal offense, whether in conventional terms or in the language of delinquency, all of the procedural requirements of the Constitution and Bill of Rights come into play.

I would reverse this judgment.